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Illicit financial flows, human rights and the post-2015 development agenda*

Interim study by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky

Summary

Illicit financial flows generated from crime, corruption, embezzlement and tax evasion represent a major drain on the resources of developing countries, reducing tax revenues and the scope for progressive taxation, hindering development and the rule of law, exacerbating poverty and inequality, and undermining the enjoyment of human rights. Tax evasion and abuse are considered to be responsible for the majority of all illicit financial outflows, followed by illicit financial flows relating to criminal activities, such as drug and human trafficking, the illicit arms trade, terrorism and corruption-based illicit financial flows. According to some estimations developing countries lost US$ 991 billion in illicit financial outflows in 2012 and those flows increased in real terms at a rate of 9.4 per cent per annum over the period 2003–2012. The annual loss is substantially more than the estimated yearly costs of achieving the Millennium Development Goals.

The present interim study is submitted pursuant to Human Rights Council resolution 25/9, and updates earlier reports by the previous Independent Expert. It outlines how illicit financial flows undermine the enjoyment of economic, social, cultural, civil and political rights and emphasizes the need for due diligence and due process in the fight against illicit financial flows, for better protection of witnesses and whistle-blowers and for incorporating human rights considerations in the management of returned stolen assets. It concludes with recommendations on how the goal of curbing illicit financial flows could be operationalized within the post-2015 development agenda of the United Nations.

* Late submission.

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I. Introduction

1. In its resolution 25/9 the Human Rights Council requested the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, to undertake a further study to analyse the negative impact of illicit financial flows on the enjoyment of human rights in the context of the post-2015 development agenda, and to present an interim study to the Human Rights Council at its twenty-eighth session.

2. The Independent Expert welcomes the request to analyse the human rights implications of illicit financial flows, which may endanger the stability and security of societies, undermine the values of democracy, morality and tax justice, and jeopardize social, economic and political development, especially when an inadequate national and international response leads to impunity. Corruption, the transfer of illicit funds, and legal and other barriers to their repatriation not only divert resources away from activities that are critical for poverty eradication, the fight against hunger and sustainable economic and social development, they also undermine the enjoyment of economic, social, cultural, civil and political rights and the right to development.

3. The present interim study updates earlier reports by the United Nations High Commissioner for Human Rights (A/HRC/19/42) and the previous Independent Expert (A/HRC/22/42 and A/HRC/25/52). It also complements a recent report on taxation policies by the Special Rapporteur on extreme poverty and human rights (A/HRC/26/28).

II. Illicit financial flows and asset recovery

A. Definitions

4. Illicit financial flows in a narrow sense are funds which are illegally earned, transferred or utilized, and include all unrecorded private financial outflows that drive the accumulation of foreign assets by residents in breach of relevant national or international legal frameworks.[1] The illicit nature stems from two distinct but overlapping causes: the first relating to the proceeds of crime, the second, initially deriving from legitimate economic activities that ultimately become illicit owing to the contravention of laws (A/HRC/22/42, para. 5). In a broader sense, illicit financial flows encompass in addition all kinds of artificial arrangements that have been put in place for the essential purpose of circumventing the law or its spirit, including certain legal "tax-optimization" schemes, making use of legal loopholes that allow for example transnational corporations to shift around profits to zero or low corporate tax jurisdictions, without undertaking any real economic activities in those jurisdictions.[2]

5. Activities related to illicit funds can also be clustered according to the illicit motivations involved.[3] Those may be market and regulatory abuse, tax abuse, tax evasion, or abuse of power, including the theft of State funds and assets, and the profit from crime or

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[1] Dev Kar and Karly Curcio, "Illicit financial flows from developing countries: 2000–2009" (Global Financial Integrity, Washington, D.C., 2011), p. 3.

[2] United Nations Conference on Trade and Development (UNCTAD), *Trade and Development Report 2014* (Geneva, 2014), p. 173.

[3] Alex Cobham, "The impacts of illicit financial flows on peace and security in Africa: Study for Tana High-Level Forum on Security in Africa" (April 2014), p. 5, available from http://bit.ly/tanastudy.

corruption. Commonly used methods to evade or avoid taxation include trade misinvoicing and transfer mispricing (A/HRC/22/42, paras. 6–7). Transfer mispricing refers to a practice of multinational companies. A subsidiary of a company avoids paying taxes in a relatively high-tax country by selling its products at a loss to a subsidiary in a low-tax country, which then sells the product to final customers at market price and yields the profit. While tax evasion, which breaks national tax laws, is illegal, many tax avoidance schemes comply with existing laws and regulations; or at least, go unchallenged in situations where tax authorities have scarce capacity and information.

6. Three main actors responsible for illicit financial flows may be identified: (a) private actors—individuals, domestic businesses and transnational corporations—committing for example tax and regulatory abuse and the related professional advisers on tax, legal matters and accounts; (b) public officeholders (both elected and employed); and (c) criminal groups.

7. Asset recovery is understood in the present report as the process by which the proceeds of corruption (as defined by articles 15–23 of the United Nations Convention against Corruption) are recovered and returned to a foreign jurisdiction. Asset recovery includes tracing of illicit assets, securing, freezing and returning them through a variety of legal avenues, including criminal confiscation and restitution, non-conviction-based confiscation, civil actions or actions involving the use of mutual legal assistance.

B. Updated estimates

8. There is overwhelming consensus that the volume of illicit financial flows is significant, although estimates vary greatly and are debated. Since illicit financial flows are by definition hidden, it is inevitable that estimates will be subject to substantial uncertainty. Methodologies continue to develop, while data quality and availability remain problematic. In addition, the lack of transparency of financial intermediaries involved in financial transactions renders it difficult to calculate illicit financial flows with a high degree of certainty. However, as stated recently in an Organisation for Economic Co-operation and Development (OECD) report, there is consensus that they exceed aid flows and investment in volume[4] and that the scale of the problem warrants international policy attention (A/HRC/22/42, para. 12).

9. For several years Global Financial Integrity (GFI) has produced regular estimates for illicit financial outflows, using data from international organizations for their statistics: They measure (a) outflows due to deliberate trade misinvoicing, by analysing imbalances in reported export and import values between a country and the world; and (b) outflows due to leakages in the balance of payments, also known as illicit hot money narrow outflows.[5] While the data and methodology of these estimates have been subject to criticism,[6] economists and international financial institutions have not to date published a comprehensive critique of GFI methodology. Alternative estimates point in the same direction: there is a huge loss owing to illicit financial flows and this annual loss is

[4] OECD, *Better Policies for Development 2014: Policy Coherence and Illicit Financial Flows 2014*, p. 23.

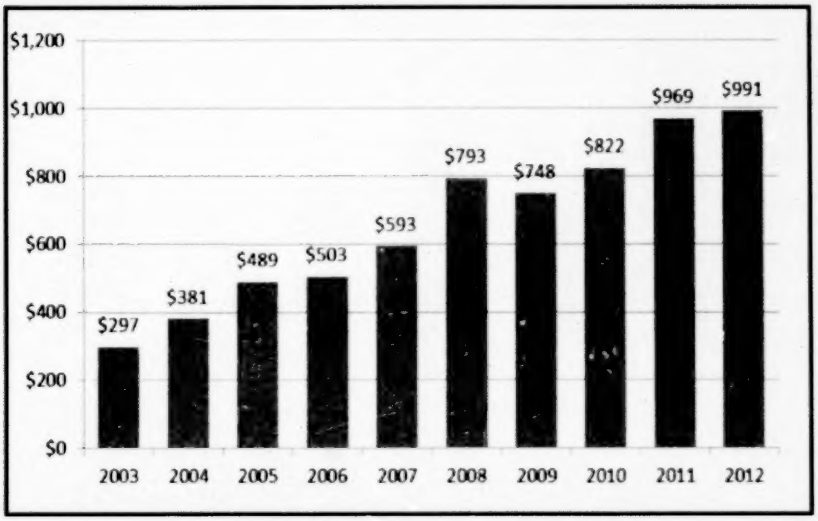
[5] Dev Kar and Joseph Spanjers "Illicit financial flows from developing countries: 2003–2012" (Global Financial Integrity, Washington, D.C., December 2014), pp. 3–6.

[6] See for example James S. Henry, "The price of offshore revisited", (Tax Justice Network, July 2012), pp. 37–39.

substantially higher than the estimated annual costs of achieving the Millennium Development Goals.[7]

10. According to the latest GFI estimates, developing countries lost US$ 991.2 billion in illicit financial outflows in 2012, a further increase of 1.8 per cent from 2011. Since 2003, illicit financial outflows have increased in real terms by about 9.4 per cent per annum. The significance of such a resource drain is demonstrated by comparing those figures with official development assistance (ODA) received by developing countries. In 2012 ODA stood at US$ 89.7 billion, meaning that, for every dollar in development assistance spent in 2012, more than US$ 10 left developing countries in the form of illicit financial outflows. According to GFI, ODA and foreign direct investment combined did not net out illicit financial outflows from developing countries over the last decade.[8]

Figure I
Illicit financial flows from developing countries 2003–2012
(Billion US$)



Source: Kar and Spanjers, *Illicit Financial Flows*, 2014 (see footnote 5), p. viii.

11. While a certain percentage of illicit financial outflows re-enters developing counties in the form of illicit inflows, those funds do not make up for the loss of capital through illicit outflows. Even estimates that net out illicit outflows with inflows indicate a substantial net outflow during recent decades.[9] Furthermore, illicit financial inflows are generally not taxed, or invested into public or social services to further the realization of human rights. Instead they flow into the underground economy, thereby compounding the

[7] Shantayanan Devarajan, Margaret J. Miller and Eric V. Swanson, "Goals for development: history, prospects and costs", World Bank Policy Research Working Paper (April 2002).

[8] Kar and Spanjers, "Illicit financial flows from developing countries: 2003–2012" (see footnote 5), p. vii.

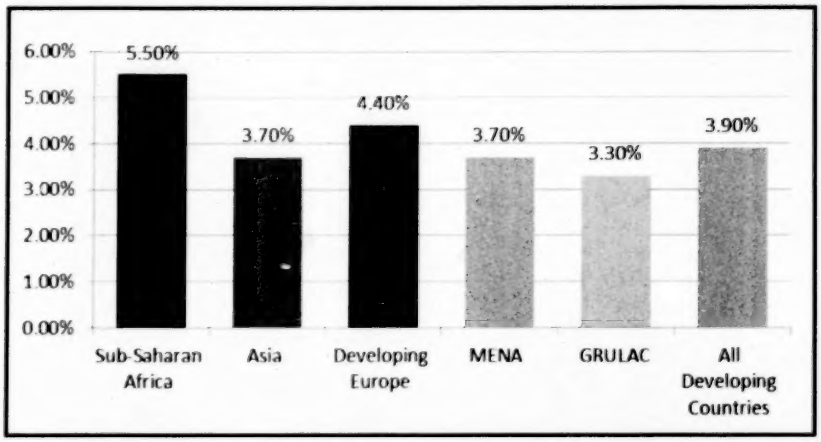
[9] See for example James K. Boyce and Léonce Ndikumana, "Capital flight from Sub-Saharan African countries: updated estimates, 1970–2010" PERI Research Report October 2013 (Amherst, University of Massachusetts), p. 5.

problem. Even if they are repatriated after they have been laundered abroad or offshore, they tend to be reinvested into luxury residential property and other luxury goods, increasing inequality rather than being allocated to strengthening the rule of law, or judicial, health, education or social security systems, for the benefit of the common good. Frequently illicit inflows fund further crime, including organized crime, human trafficking, piracy, the illicit arms trade and terrorist activities undermining the rule of law, peace and security, and human rights.[10]

12. Trade misinvoicing is estimated to be the most popular way of moving funds illicitly out of developing countries. GFI estimated that they account for 77.8 per cent of all illicit outflows over the last decade. Although Sub-Saharan Africa has the smallest nominal share of regional outflows over the period 2003–2012, it has the highest average illicit outflows to gross domestic product ratio (5.5 per cent), indicating that illicit financial outflows have had a disproportionate impact on the region.[11]

Figure II

Illicit financial flows from developing countries 2003–2012 (percentage of GDP)



Source: Kar and Spanjers, *Illicit financial flows*, 2014 (see footnote 5), p. 46.

MENA = Middle East and North Africa.

GRULAC = Latin America and the Caribbean.

13. Illicit financial flows are also a serious concern for developed countries. Tax avoidance schemes by transnational corporations shifting profits to low tax jurisdictions within OECD countries and commercial banks that facilitate tax evasion by high net worth individuals in a systematic manner have recently received much attention.[12] In addition,

[10] For a comprehensive analysis see for example Alex Cobham, (see footnote 3) and Jeremy Haken, "Transnational crime in the developing world" (Washington D.C., Global Financial Integrity, 2011).

[11] Kar and Spanjers, "Illicit financial flows from developing countries: 2003–2012" (see footnote 5), p. 46.

[12] See for example, www.forbes.com/sites/halahtouryalai/2013/01/04/tale-of-two-swiss-banks-why-wegelin-failed-and-ubs-survived-tax-evasion-charges/ and www.icij.org/project/luxembourg-leaks.

there is a lack of comprehensive information as to where illicit funds are held.[13] While in some cases significant funds may be returned and invested in private assets, such as land and luxury estates in the countries of origin, most funds remain offshore (A/HRC/22/42, paras. 20–23). The main beneficiaries of illicit financial flows are secrecy jurisdictions, financial service providers and economic sectors into which laundered funds are reinvested, including vendors of luxury estates and producers of luxury goods.

14. Against common beliefs, corruption-based illicit financial outflows account only for a small fraction of all illicit financial flows. The Stolen Asset Recovery Initiative (StAR), a joint initiative by the World Bank and the United Nations Office on Drugs and Crime (UNODC), has tried, jointly with Organisation for Economic Co-operation and Development, to track international asset recovery efforts relating to corruption-based illicit financial flows. Their report *Few and Far: The Hard Facts on Stolen Asset Recovery*, published in September 2014, provides a bleak picture of international asset recovery efforts.[14]

15. Between 2010 and June 2012, only 8 of 34 OECD countries reported asset recovery efforts (Belgium, Canada, Luxembourg, the Netherlands, Portugal, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America) including cross-border asset tracking, freezing or asset return efforts.[15]

16. On the positive side, the volume of assets frozen between 2010 and June 2012 amounted to US$ 1.39 billion and increased in comparison to the four-year period from 2006 to 2009 (US$ 1.23 billion). However assets returned from 2010 to June 2012 remained US$ 147.2 million lower compared to the earlier period. A slightly positive development is that assets returned to developing countries increased from US$ 108.1 million (during the four years from 2006 to 2009) to 127.7 million (for the 2.5 years from 2010–June 2012). However, the total volume of assets returned between 2006 and June 2012 was US$ 423.5 million, which is significantly less than the US$ 2.623 billion in assets that were reported frozen, and again only a fraction of the estimated US$ 20 billion to 40 billion stolen each year from developing countries by means of corruption-related activities.[16] Figure 3 illustrates this relationship, assuming a rather conservative estimate of an annual outflow of US$ 20 billion in the form of corruption-based illicit financial flows.

[13] For recent estimates, see Gabriel Zucman, "The missing wealth of nations: Are Europe and the U.S. net debtors or net creditors?" in *Quarterly Journal of Economics*, vol. 103, No. 3, 2013; Gabriel Zucman, "Taxing across borders: tracking personal wealth and corporate profits", *Journal of Economic Perspectives*, vol. 28, no.4, 2014.

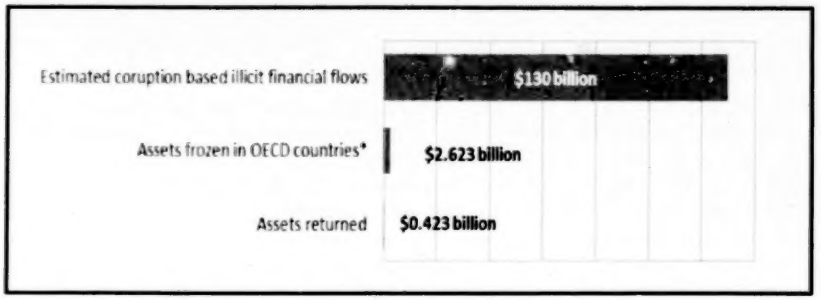
[14] Larissa Grey and others, *Few and Far: The Hard Facts on Stolen Asset Recovery* (Washington, D.C., World Bank, 2014).

[15] Ibid. p. 18. It should be noted that in addition France and Australia reported asset freezes during the period 2006–2009.

[16] Ibid. pp. 18–21 and p. 26. The data do not include assets frozen worldwide pursuant to United Nations Security Council resolutions 1970 (2011) and 1973 (2011) in relation to Libyan individuals and institutions, amounting to US$ 25.6 billion, which were not exclusively the proceeds of corruption.

Figure III

Estimates of corruption-based illicit financial flows, assets frozen and returned from OECD countries, 2006–June 2012



Source: Larissa Grey and others, *Few and Far*, 2014 (see footnote 14), p. 21.

17. According to data collected by StAR only four OECD countries managed to return stolen assets to countries of origin after completing national legal procedures during the 6.5 year period between 2006 and June 2012. They are Australia, Switzerland, United Kingdom and the United States of America, with Switzerland and the United States of America, each accounting for about 40 per cent of all asset returns to foreign jurisdictions.[17]

18. The results demonstrate the difficulties and barriers existing in the complex process of tracking stolen assets, freezing them, or returning them through criminal or non-conviction based confiscation, private civil action and domestic investigation. The political will to combat corruption and to recover assets in receiving States, timely and well documented requests for mutual legal assistance and close collaboration between investigating authorities in countries of origin and destination are all essential to ensure the successful repatriation of stolen assets. States continue to face challenges in recovering assets owing to differences between legal systems, the complexity of multijurisdictional investigations and prosecutions, the limited implementation of effective domestic tools such as non-conviction-based forfeiture for asset recovery, lack of familiarity with the mutual legal assistance procedures of other States and difficulties in identifying the flow of corruption proceeds. In addition there are particular challenges posed in recovering the proceeds of corruption in cases involving individuals occupying prominent public positions.

19. One significant way of reducing illicit gains and related illicit financial flows is to focus on the supply side, the bribe payers. An estimated US$ 1 trillion is paid in bribes worldwide each year, and bribery in the developing world may amount to an equivalent of 15–30 per cent of all ODA. Ending impunity on the supply side must be part of the efforts to reduce illicit financial flows. An OECD report taking stock of the total number of individuals and legal persons sanctioned or acquitted in relation to foreign bribery from 1992 to 2012 shows significant disparities between prosecutorial efforts and the enforcement of anti-bribery legislation in the 40 States parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention).[18]

20. However, even if transborder bribery is prosecuted, monetary sanctions frequently do not reach the country where the bribe took place. An analysis by StAR of 395 foreign

[17] Larissa Grey and others, *Few and Far* (see footnote 14), p. 20.

[18] OECD, "Illicit Financial Flows from Developing Countries, Measuring OECD responses", (Paris, 1994), pp. 84–93 and Annual Report of the OECD Working Group on Bribery 2014, pp. 14–19.

bribery cases that were solved through legal settlements showed that only 3.3 per cent (or US$ 197 out of the total value of settlements of nearly US$ 6 billion) was returned or ordered to be returned to the countries where the bribery had taken place, as monetary sanctions were mostly imposed in countries where the corrupt companies were headquartered.[19]

21. It should be stressed that the return of stolen assets is only the last step and is unlikely to result in the full recovery of assets stolen, as it is frequently very difficult to trace, freeze and finally return stolen assets in accordance with international and national legal provisions. Much more needs to be done on the supply side of illicit financial funds, to prevent illicit financial outflows leaving countries of origin and to combat non-corruption-based illicit financial outflows related to tax evasion and questionable tax avoidance schemes. Curbing tax-based illicit financial flows would, from a purely financial perspective, have the biggest impact on the fiscal space of States and their ability to realize social and economic rights and the right to development.

III. Illicit financial flows and human rights

22. There are various connections between illicit financial flows and human rights: illicit financial outflows deprive Governments first and foremost of resources required to realize progressively economic, social and cultural rights. They also undermine efforts to build up effective institutions to uphold civil and political rights and the rule of law in the countries of origin. Third, business enterprises, including transnational business corporations, have to ensure that their tax planning strategies and policies not only adhere to national law, but also comply with international human rights norms. Fourth, whistle-blowers and reporting persons, media representatives and human rights defenders require effective protection based on international human rights standards and the United Nations Convention Against Corruption . Fifth, human rights and due process guarantees are essential to protect persons from undue allegations, undue removal from office, criminalization, freezing or confiscation of their assets or arbitrary deprivation of property or detention. Finally, human rights obligations of States should also inform the public management of returned assets to ensure that maximum available resources are directed to the realization of economic, social and cultural rights.

A. Impact on social, economic and cultural rights

23. Illicit financial outflows divert resources intended for development and may undermine government efforts to provide basic services and ability to comply with their international human rights obligations. The diversion of resources due to illicit financial outflows reduce the "maximum resources" available to the countries of origin for the realization of economic, social and cultural rights (A/HRC/26/28, paras. 24–28). It would be improper to solely blame illicit financial flows for lack of compliance with human rights obligations. Failure to respect social, economic and cultural rights is frequently not exclusively due to unavailability of public funds. However, illicit financial outflows from developing countries and tax abuse in industrialized countries have clearly limited the fiscal space of governments to ensure the progressive realization of social, economic and cultural rights.

[19] Jacinta Anyango Oduor and others, *Left out of the Bargain: Settlements in foreign bribery cases and Implications for Asset Recovery* (Washington, World Bank, 2014), p. 2.

24. A comprehensive report published in October 2013 by the International Bar Association underscored the linkages between illicit financial flows, poverty and human rights. The report found that

> tax abuses have considerable negative impacts on the enjoyment of human rights. Simply put, tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights. Actions of States that encourage or facilitate tax abuses, or that deliberately frustrate the efforts of other States to counter tax abuses, could constitute a violation of their international human rights obligations, particularly with respect to economic, social and cultural rights.[20]

25. This link has also been stressed by the Special Rapporteur on extreme poverty and human rights, who recently stated that tax abuse is

> not a victimless practice: it limits resources that could be spent on reducing poverty and realizing human rights, and perpetuates vast income inequality. While the rich benefit from this practice, the poor feel the negative impact on their standard of living, their unequal political power and the inferior quality of health and education services for themselves and their children. (A/HRC/26/28, para. 59)

26. The Special Rapporteur emphasized that high levels of tax abuse undermine the principles of equality and non-discrimination, given that evaders end up paying less than taxpayers with the same— or less— capacity to pay. High net-worth individuals and large corporations also have a far greater ability to evade or avoid taxes as they are able to pay tax advisers or able to open undeclared foreign bank accounts in low-tax jurisdictions. Governments then have to raise revenue from other sources: often regressive taxes, the burden of which falls hardest on the poor. Therefore, if States do not tackle tax abuse, they are likely to be disproportionately benefiting wealthy individuals to the detriment of the most disadvantaged (ibid., para. 60).

27. The negative impact on social and economic rights can be illustrated by analysing how illicit financial flows have contributed to undermining efforts of governments in sub-Saharan States to realize progressively the right to health, as enshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights. A recent study published in the Journal of the Royal Society of Medicine has estimated the impact of illicit financial outflows on the ability of sub-Saharan States to realize Millennium Development Goal 4, relating to the right to health. The three indicators for Goal 4 are: (1) Under-five mortality rate, (2) Infant mortality rate and (3) Proportion of 1 year-old children immunized against measles. The study analysed data for 34 countries in Sub-Saharan Africa. The results speak for themselves: at the current rate of progress it is estimated that only six of the 34 countries in Sub-Saharan Africa would reach their Millennium Development Goal targets by the end of 2015. If illicit financial outflows were completely curtailed, that number could be increased to 16 countries. Even those countries that would not achieve their targets by 2015 would be able to reach them in a substantially shorter period in the absence of illicit financial flows.[21]

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[20] International Bar Association, "Tax abuses, poverty and human rights: a report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights" (London, 2013), p. 2.

[21] Bernadette O'Hare et al., "The effect of illicit financial flows on time to reach the fourth Millennium Development Goal in Sub-Saharan Africa: a quantitative analysis" in *Journal of the Royal Society of Medicine*, vol. 107, No. 4, 2014, available from http://jrs.sagepub.com/content/107/4/148.short.

28. In the decade before the Ebola outbreak, Guinea, Liberia and Sierra Leone experienced, according to recent GFI estimates, an annual average of US$ 1.37 billion illicit financial outflows, while, according to the World Health Organization (WHO), during the same period the three countries spent on average only US$ 140 million per year on public health (see fig. IV).[22] All three countries were under International Monetary Fund (IMF) programmes, failed to meet targets for social spending before the outbreak and saw a further decrease in the number of community health workers from 0.11 per 1,000 population in 2004 to 0.02 per 1,000 population in 2010.[23] Some health experts claimed that IMF programmes contributed to the weaknesses of the public health systems in the countries, an assessment that has been questioned.[24]

29. In addition to illicit financial flows, the three countries paid on average US$ 205 million in debt service per annum on public or publicly guaranteed external debt during the decade before the Ebola outbreak, and continued to spend US$ 81.6 million in 2013.[25] In Sierra Leone, where the estimate for illicit financial outflows is lower, legal tax incentives and tax breaks for extractive industries have weakened domestic resource mobilization. Christian Aid has estimated that the Government of Sierra Leone will lose revenues of US$ 131 million in the three years 2014–16 alone as the result of corporate income tax incentives granted to five mining companies – an average of US$ 43.7 million a year. All tax incentives combined amounted in 2012 to eight times the health budget and seven times the education budget.[26] While the roots of the weakness of the public health system in the Ebola-affected countries are varied, tax evasion, legal tax breaks and external debt services have been contributing factors to the weak state of public health institutions and services. The above examples demonstrate that debt relief, improved tax regimes and a reduction in illicit financial flows would allow those and many other least developed countries to improve their public health and education systems.

[22] Kar and Spanjers, "Illicit financial flows from developing countries: 2003–2012" (see footnote 5), pp. 28–29; WHO, Global health expenditure database, General Government expenditure on health 2012 in US$, available from http://apps.who.int/nha/database/Home/Index/en.

[23] Alexander Kentikelenis and others, "The International Monetary Fund and the Ebola outbreak", The Lancet Global Health (2015), available from http://dx.doi.org/10.1016/S2214-109X(14)70377-8.

[24] See Sanjeev Gupta, "Response to 'The International Monetary Fund and the Ebola outbreak'", The Lancet Global Health, available from http://dx.doi.org/10.1016/S2214-109X(14)70345-6.

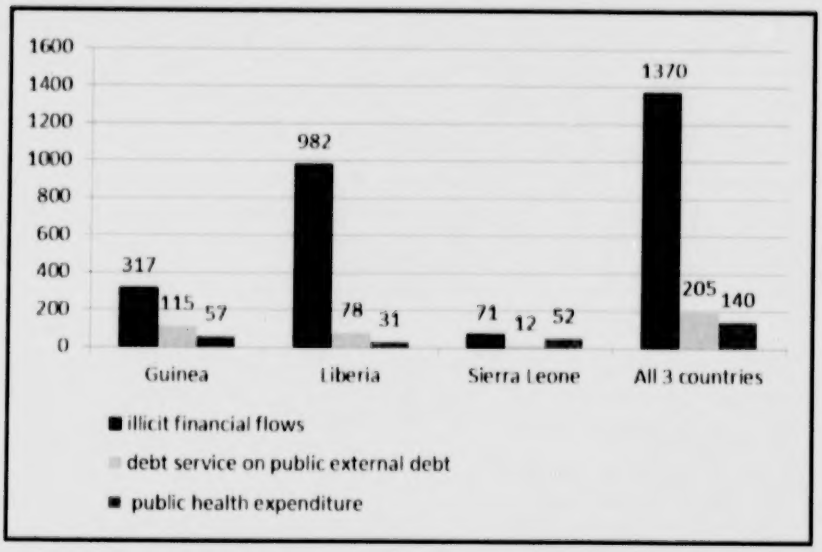
[25] World Bank, International Debt Statistics, Debt service on external debt, public and publicly guaranteed, available from http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=international-debt-statistics.

[26] Christian Aid, "Losing out: Sierra Leone's massive revenue losses from tax incentives" (London, Christian Aid, April 2014), pp. 5–6, available from www.christianaid.org.uk/images/Sierra-Leone-Report-tax-incentives-080414.pdf.

Figure IV

Illicit financial flows, debt service on public external debt and public health expenditures of Ebola-affected countries, annual averages 2003–2012

(In millions of dollars)



Source: see footnotes 22 and 25.

30. The Independent Expert welcomes the call for debt relief for Ebola-affected countries made by the United States of America and the United Nations Economic Commission for Africa and hopes that such relief will be implemented swiftly, after the G20 summit in Brisbane announced in November 2014 that IMF would grant a US$ 300-million package to Ebola-affected countries comprising new concessional loans, debt relief and grants.

B. Impact on civil and political rights and on the rule of law

31. Illicit financial outflows and their non-repatriation undermine civil and political rights and the rule of law in countries of origin and destination. The existence of illicit unregulated money contributes to the spread of other criminal activities, such as illegal weapons, smuggling, terrorism and the infiltration of criminal interests in the public sector. That includes funding of political parties or election campaigns in contravention of domestic regulations, contributing to the risk of State capture and subverting the right to vote and to participation in public affairs on a non-discriminatory basis.

32. In addition, States need independent, well-equipped, trained and properly paid officers responsible for combating corruption and tax evasion, handling requests for mutual legal assistance and a properly functioning independent judicial system to combat illicit financial funds. Significant investments are required to ensure that nobody is above the law, including so-called politically exposed persons, their associates, or large business

enterprises.[27] Where both the incentives for and the opportunities to export illicit wealth are significant, it is likely that the damage to the rule of law will be exacerbated. It has been pointed out that "the potential to hide illicit capital securely in tax havens is a direct stimulus to corruption and other illicit activities like transfer mispricing. It decreases the chances of detection and therefore increases the likely returns".[28] If parts of the political elite are able or willing to accumulate wealth through illicit outflows, economic inequalities are exacerbated and incentives to strengthen tax agencies, the investigatory powers of police services, the independence of the judiciary and public audit services are low. That is a problem in particular in developing countries that face resource constraints in establishing well-equipped and independent institutions to address such complex issues as transfer mispricing.

C. Responsibilities of business enterprises

33. Illicit financial flows should not be a human rights concern for States only. While States have the primary duty to respect, protect and fulfil human rights, business enterprises are also required to "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur" as set out in the Guiding Principles on Business and Human Rights (guiding principle 13). Business enterprises have to respect human rights throughout their operations. They can demonstrate respect for human rights through appropriate policies and due diligence procedures. Multinational enterprises, as well as their advisers and financiers, need to understand that their tax planning strategies have potential negative impacts on human rights.

34. Business enterprises that contribute through transfer mispricing, tax evasion or corruption to significant illicit financial outflows cause adverse human rights impacts by undermining the abilities of States to progressively achieve the full realization of economic, social and cultural rights. This is particularly the case when they operate in States that have difficulties in meeting the minimum core human rights obligations. One obvious way for business enterprises to show responsible behaviour and demonstrate compliance is to embrace a greater degree of transparency, in particular by publishing on a country-by-country basis their sales, profits and taxes.

35. The same applies to trust and company service providers and commercial banks that do not meet basic due diligence standards when they provide services or help launder and hide illicit funds in offshore financial centres. Most illicit financial flows are facilitated by tax havens, secrecy jurisdiction, shell companies that cannot be traced back to their owners, anonymous trust accounts, bogus charitable foundations, money-laundering techniques and questionable trade practices. There is evidence that banks play a key role in facilitating illicit financial flows when they do not exercise due diligence with their customers (A/HRC/22/42, para. 11). It is the responsibility of States to ensure that their banking regulations comply fully with international recommendations against money-laundering and to take action against structures facilitating illicit financial flows.

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[27] See Theodore S. Greenberg and others., *Politically Exposed Persons: Preventive Measures for the Banking Sector* (Washington: Stolen Asset Recovery Initiative, 2010); see also Emile van der Does de Willebois et al., *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (Washington: Stolen Asset Recovery Initiative, 2010).

[28] Mick Moore, "The practical political economy of illicit flows" in Peter Reuters (ed.), *Draining Development*, p. 474.

D. Protection of whistle-blowers and reporting persons

36. In its resolution 23/9, the Human Rights Council acknowledged the important role that civil society plays in exposing corruption and drawing attention to the negative impact of the non-repatriation of funds of illicit origin on the rule of law and the realization of economic, social and cultural rights. In that resolution the Council reiterated the obligation of States to protect reporting persons in accordance with article 33 of the United Nations Convention against Corruption and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

37. Journalists, whistle-blowers, anti-corruption activists, investigating officers, judges, prosecutors, lawyers and human rights defenders exposing corruption have frequently been victims of reprisals or human rights violations, including death threats, arbitrary detention, enforced disappearances and killings. Between 1 January 2010 and 31 November 2014, the special procedures of the Human Rights Council sent more than 35 urgent appeals and letters of allegation to 22 countries and territories covering such concerns.[29] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression recently stressed that journalists covering corruption, organized crime and drug trafficking were at particular risk (see A/HRC/20/17). According to the Committee to Protect Journalists, as of 31 December 2014 out of 725 journalists murdered since 1992 worldwide, 208 of them, or 29 per cent, had covered corruption issues.[30] Reporters Without Borders reported in 2011 that at least 141 journalists covering organized crime or drug trafficking—another major source for illicit financial flows— were killed in the decade 2000–2010.[31]

38. While several jurisdictions have introduced new laws protecting witnesses, whistle-blowers or persons reporting corruption, the protection of whistle-blowers and witnesses to corruption frequently falls short of international standards or best practices. The latest thematic report presented to the Implementation Review Group of the United Nations Convention against Corruption notes that there "was wide variation among the States parties with regard to the protection of witnesses, experts and victims". While in several States the protections went beyond the minimal protection of non-disclosure of the identity or whereabouts of witnesses, the report noted that "in several States no measures had been taken for the effective protection of witnesses and experts". The report furthermore underlines that "a number of States parties had not established comprehensive whistle-blower protections, although legislation was pending in several cases. Common challenges related to specificities in national legal systems, limited capacity and the absence of specific regulations or systems for the protection of whistle-blowers" (CAC/COSP/IRG/2014/7, paras. 13–14).

39. Transparency International has highlighted the fact that many legal frameworks to protect whistle-blowers do not adequately ensure the confidentiality and anonymity of reporting persons or fail to cover whistleblowing within the private sector.[32] Several countries have introduced notable new national legislation strengthening the protection of whistle-blowers in recent years: they include the Republic of Korea, South Africa, and

[29] See the periodical communications reports of special procedures, A/HRC/28/85, A/HRC/27/72, A/HRC/26/21, A/HRC/25/74, A/HRC/24/21, A/HRC/23/51, A/HRC/22/67, A/HRC/21/49, A/HRC/20/30, A/HRC/19/44, A/HRC/18/51.

[30] Committee to Protect Journalists, data available from www.cpj.org/killed/murdered.php

[31] Reporters Without Borders, "Organized crime: Muscling in on the media" (Paris, 2011).

[32] Transparency International, "Whistleblower Protection and the UN Convention against Corruption" (Berlin, 2013).

Slovenia, and, during 2014, Ireland and Greece.[33] An analysis of whistle-blower legislation in the European Union showed that national legislation frequently falls short of international standards or best practice. In November 2013 only four countries had legal frameworks for whistle-blower protection that Transparency International considered advanced.[34] The Independent Expert hopes that a new recommendation adopted on 30 April 2014 by the Council of Europe will strengthen the protection of whistle-blowers. Their protection is, however, a worldwide concern, as indicated by reports of the Implementation Review Group of the Convention and of anti-corruption organizations.[35] In addition, the protection of persons exposing tax abuses or evasion who may not be able to rely on the protection of the Convention needs to be strengthened.

E. Due process in asset recovery and criminal matters

40. Human rights are also relevant for the seizure and freezing of the proceeds of corruption or other criminal activities. That includes due process rights in criminal or civil law matters against persons presumed to be responsible for corruption, tax evasion or other related criminal conduct and ensuring the independence of authorities charged with investigating and prosecuting crimes, including ensuring that asset freezing and forfeiture does not deprive persons suspected of, or investigated for, corruption of the enjoyment of essential core minimum levels of social, economic and cultural rights. While the right to property, contained in article 17 of the Universal Declaration of Human Rights and in several regional human rights instruments, does not protect stolen assets from recovery, no one may be arbitrarily deprived of that right. The Independent Expert is also concerned about reports that governments have occasionally used charges of tax evasion or corruption against former members of the ruling elite, political opponents, dissidents or human rights defenders to criminalize them. Special procedures have also sent communications on behalf of such individuals.[36]

41. It is also notable that some provisions of the Convention against Corruption have been contested on human rights grounds. Article 31, paragraph 8, of the Convention provides that an offender must demonstrate the lawful origin not only of the alleged proceeds of crime but also of other property liable to confiscation. The United Nations High Commissioner for Human Rights has noted that "similar provisions were analysed in a set of precedents that established the conditions that must be met in order not to violate due-process rights. Such precedents held that the right to be presumed innocent is not an absolute right, and that legal presumptions in criminal law are not per se restrictive to such right as long as States take into account the importance of what is at stake, and respect the right to defence" (A/HRC/19/42, para. 46).

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[33] Ibid., and Transparency International, press releases "Transparency International welcomes Protected Disclosures Act 2014" (15 July 2014), and Transparency International: "Legal protection for citizens who denounce big corruption cases" (23 April 2014), available from www.transparency.org.

[34] Mark Worth: "Whistleblowing in Europe: legal protections for whistleblowers in Europe" (Berlin, Transparency International, 2013).

[35] Council of Europe, Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers; Transparency International, "Fighting corruption in South Asia: building accountability" (Berlin, 2014), pp. 12–13.

[36] See for example communications MNG 1/2012 of 21 May 2012, reported in A/HRC/21/49, and PRK 1/2013 of 17 December 2013, reported in A/HRC/26/21.

F. Use of repatriated illicit funds

42. Finally, a human rights approach to asset recovery has to consider policy implications relating to the use of returned illicit funds. StAR has pointed out that the use of returned assets is the sovereign decision of the country that recovers its stolen property, but concluded that "countries that have embraced a policy of openness and transparency in the design of arrangements for the management of returned assets have benefited from this approach".[37]

43. The Independent Expert supports that view. In his estimation, respect for and adherence to the human rights principles of transparency, accountability and participation is a critical factor in ensuring the prudent use of repatriated illicit funds. He further endorses the view that "decisions over resources allocation cannot be made behind closed doors, but publicly and openly, with due attention to civil society's demands. In some cases, lack of transparency and participation in the allocation decisions can end up in the use of the recovered assets to ends different from those sought by human rights principles" (A/HRC/19/42, para. 30). As the study by the High Commissioner underscored, since "recovered resources are not foreseen or public income included in the budget, States must allocate them in accordance with their obligation to devote the maximum of available resources to the fulfilment of economic, social, and cultural rights" (ibid., para. 28).

44. In transitional countries, returned illicit assets may also help States to fulfil their obligations to provide reparation to victims of human rights violations of a previous regime. This is particularly the case if returned illicit funds derive from assets controlled by politically exposed persons who are alleged to have been directly or indirectly responsible for past human rights violations. While not a comprehensive solution to the problem of financing transitional justice initiatives and reparation programmes, recovered assets have for example been used in Peru for anti-corruption and transitional justice measures, including truth-seeking and reparations.[38] The Egyptian Initiative for Personal Rights, published in September 2014, a best practice compilation for the management of recovered assets, drawing on international experiences.[39]

45. It is important that asset recovery efforts are viewed as one of several efforts that States must make in order to comply with their human rights obligations. As the High Commissioner for Human Rights has underscored, those "obligations apply to both countries of origin and recipient countries of funds of illicit origin due to the principle of international cooperation and assistance towards the realization of human rights, particularly economic, social, and cultural rights" (A/HRC/19/42, para. 24).

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[37] StAR Initiative, "Stolen Asset Recovery – Management of returned assets: Policy considerations" (Washington, D.C., 2009), p. xi.

[38] Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for Post-Conflict States: Reparations programmes* (New York and Geneva, 2008) and Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" in *The International Journal of Transitional Justice*, vol. 2, No. 3 (2008), *pp. 310–330*.

[39] Egyptian Initiative for Personal Rights, "How to best utilize our stolen assets? Best practices for the management of recovered assets" (Cairo, September 2014), available from http://www.eipr.org/sites/default/files/reports/pdf/asset_recovery_e.pdf.

IV. International initiatives to curb illicit financial flows

46. Before discussing the importance of curbing illicit financial flows in the context of the post-2015 development agenda, the Independent Expert wishes to provide a brief overview of recent international initiatives, updating information contained in previous reports (A/HRC/22/42 and A/HRC/25/52).

47. The Convention against Corruption constitutes a comprehensive point of reference for anti-corruption laws, institutions and actions of States parties and recognizes the return of illicit funds as one of its fundamental principles in article 57, paragraph 3 (a). In article 52 of the Convention each State party is enjoined to "conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates".

48. The Independent Expert welcomes the fact that Germany, Oman, the State of Palestine and the Sudan ratified the Convention in 2014, bringing the number of States parties to 173 (as of 31 December 2014). He calls upon those States that have not yet signed or ratified the Convention to do so at their earliest opportunity.

49. The Conference of States Parties to the United Nations Convention against Corruption has set up the open-ended intergovernmental working group on asset recovery. Since its first session in 2006, the working group has convened eight times and discussed during its most recent meeting the prevention and detection of transfer of the proceeds of crime, and measures for direct recovery of property under articles 52 and 53 of the Convention.[40]

50. On 18 December 2014, the General Assembly adopted resolution 69/199, in which it underlined the need to redouble efforts to assist in the recovery of stolen assets in order to preserve stability and sustainable development and for transparency in financial institutions. The General Assembly called upon Member States to continue to work with all stakeholders in international and domestic financial markets to deny safe haven to assets acquired illicitly by individuals engaged in corruption and urged States to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of, and the fight against, corruption. The General Assembly acknowledged the vital importance of ensuring the independence and effectiveness of authorities charged with investigating and prosecuting crimes of corruption and of recovering the proceeds of such crimes and the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights. In addition, in resolution 69/199 the Assembly expressed concern about the negative impact of widespread corruption on the enjoyment of human rights, recognizing that corruption constitutes one of the obstacles to the effective promotion and protection of human rights, as well as to the achievement of the Millennium Development Goals and other internationally agreed development goals.

51. StAR, jointly launched in 2007 by UNODC and the World Bank, supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centres to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets. In recent years StAR has continued providing training, capacity-building and technical assistance to countries that are operationally engaged in asset recovery cases. Its corruption case database includes, as of 31 December 2014, information on 748 transborder corruption cases.

[40] CAC/COSP/WG.2/2014/4, paras. 40–58.

52. The third meeting of the Arab Forum on Asset Recovery, hosted by the Government of Switzerland, in association with StAR, was held in Geneva from 1 to 3 November 2014, bringing together 250 specialists from 40 countries.[41] In parallel, a side event focused on the role of civil society organizations in the asset recovery process and stressed the need to create mechanisms for information sharing between civil society and governments, and the need to establish accountable and transparent mechanisms to manage and dispose of returned assets, through broad consultation with concerned stakeholders.[42]

53. On 29 and 30 April 2014, StAR provided technical support to the Ukraine Forum on Asset Recovery following asset freezes in relation to the former Ukrainian President, Viktor Yanukovych, and his associates by Austria, Canada, Liechtenstein, Switzerland, the United States of America and the European Union. In that context a guide for civil society organizations illustrating how they can contribute to asset recovery efforts was published.[43]

54. In response to public outcry over tax evasion and corporate tax avoidance, the G8 countries made a commitment at the Lough Erne Summit in June 2013 to introduce automatic exchange of information by tax authorities across the world in order to fight the scourge of tax evasion; to change rules that let companies shift their profits across borders to avoid taxes; to assist developing countries with information and capacity to collect taxes owed to them; to introduce public country-by-country reporting for extractive companies; and to address the issue of misuse of shell companies to facilitate illicit financial flows.[44] OECD was tasked by the G8 and G20 Finance Ministers with developing an Action Plan on Base Erosion and Profit Shifting , published in July 2013, containing 15 specific actions to address a range of issues relating to tax transparency, accountability and information exchange. The G20 declaration in St. Petersburg in September 2013 underlined that "developing countries should be able to reap the benefits of a more transparent international tax system".

55. During the annual meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes in Berlin in October 2014, 51 jurisdictions announced the introduction of a new single global standard on Automatic Exchange of Information on Taxation Matters by 2017 or the end of 2018. Leaders at the G20 summit in Brisbane, Australia, in November 2014 affirmed the principle that "profits should be taxed where economic activities deriving the profits are performed and where value is created". G20 leaders also welcomed progress on taxing patent boxes, a practice whereby intellectual property royalties can divert profits from the countries where they are made.[45]

56. Concerns have, however, been expressed that developing countries have been excluded from the design phase of the new system for automatic exchange of tax information or may not yet be in a position to provide reciprocal information and may thus gain little from it, which would deprive many low and middle income countries of the benefits of international tax information exchange. One suggestion is for a window of, say,

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[41] See final communiqué, available from http://star.worldbank.org/star/sites/star/files/co_chairs_english.pdf.

[42] Recommendations from civil society are available from www.transparency.org/files/content/pressrelease/Final_civil_society_recommendations_from_AFAR_III_Geneva.pdf.

[43] For more details see http://star.worldbank.org/star/UFAR/stolen-asset-recovery-ukraine-0. The guide is available from http://star.worldbank.org/star/ufar/ukraine-resources.

[44] See G8 Lough Erne Declaration; 2013 Lough Erne G8 Leaders' Communiqué; Common principles on misuse of companies and legal arrangements and the G8 action plan principles to prevent the misuse of companies and legal arrangements, available from https://www.gov.uk/government/collections/g8-communique-and-documents.

[45] See www.theguardian.com/business/2014/nov/16/g20-tax-avoidance-pledge-still-leaves-poor-countries-vulnerable.

five years, during which lower-income countries would receive tax information automatically, without a requirement for full reciprocity. That would allow time for domestic systems to be modified and improved, while demonstrating the value of participating in information exchange.

57. OECD has named combating illicit financial flows one of its three priority areas in its Strategy on Development (2012). In 2014, OECD published a report entitled "Illicit Financial Flows from Developing Countries: Measuring OECD Responses", which analyses the performance of OECD countries against the main international standards for countering illicit financial flows. It focuses on five policy areas: money-laundering, tax evasion, foreign bribery, asset recovery and the role of development agencies. Another OECD publication – *Better Policies for Development 2014: Policy Coherence and Illicit Financial Flows* stresses the need for policy coherence to address illicit financial flows. The OECD analysis shows that countries are making progress in the fight against illicit financial flows, but warns that "without action, OECD countries are at risk of becoming safe havens for illicit assets from developing countries" (p. 22).

58. The Financial Action Task Force (FATF) has become an international policymaking body in the fight against money-laundering. FATF has developed a series of recommendations that are recognized as the international standard for combating money-laundering and the financing of terrorism, and conducts peer reviews of each member on an ongoing basis to assess their implementation. In February 2012, FATF adopted a new set of recommendations which will provide an opportunity to ensure that national legislation makes it more difficult to hide illicit money in secrecy jurisdictions. In October 2013 new FATF guidance on the due diligence requirements in relation to politically exposed persons was published, followed in 2014 by guidance on transparency and beneficial ownership to deter and prevent the misuse of corporate vehicles for money-laundering, terrorist financing, tax evasion or other illicit activities.

59. At the regional level in Africa, the African Union and the Economic Commission for Africa have been combating the flow of illicit funds. The High-Level Panel on Illicit Financial Flows was established in February 2012 to address the debilitating problem of illicit financial outflows from Africa. The Panel has carried out consultations, country visits and studies in six African countries. In its progress report, the Panel found "that in some African countries, the institutional architecture for responding to illicit financial flows was at best uneven or, as in several key instances, non-existent. Lack of transparency, secrecy and the difficulty of obtaining information and systematic data remain key challenges across the board" (E/ECA/CM/47/6, para. 20).[46]

60. In February 2013, the European Commission published proposals to amend the Anti-Money-Laundering Directive, clarifying the definition of "beneficial ownership" and providing more detail on customer due diligence requirements.[47] The new directive will for the first time oblige European Union member States to maintain central registers listing information on the ultimate beneficial owners of corporate and other legal entities, and trusts. The registers will not be public, but accessible to competent authorities and financial

[46] The final report of the High-Level Panel was released on 31 January 2015 after the present study was submitted by the Independent Expert for editing. It will be duly considered in the final study of the Independent Expert. See "Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa" commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development, available from www.uneca.org/sites/default/files/publications/iff_main_report_english.pdf

[47] Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM(2013)45.

intelligence units and to people with a "legitimate interest", such as investigative journalists and other citizens concerned. The aim is to enhance transparency, make "dodgy deals" harder to hide and fight money-laundering and tax crime.

V. Curbing illicit financial flows and the United Nations post-2015 development framework

61. IFFs were not explicitly addressed in the United Nations Millennium Development Goals, including Goal 8 on global partnership for development, covering foreign debt, trade and development cooperation. That neglect has been addressed by the report of the United Nations High-Level Panel of Eminent Persons on the post-2015 development agenda, published in May 2013, which recommended including a global target to "reduce illicit flows and tax evasion and increase stolen-asset recovery" in the future development goals.[48]

62. The report stated that "it is time for the international community to use new ways of working, to go beyond an aid agenda and put its own house in order: to implement a swift reduction in corruption, illicit financial flows, money-laundering, tax evasion, and hidden ownership of assets". It underlined that developed countries "have special responsibilities in ensuring that there can be no safe haven for illicit capital and the proceeds of corruption and that multinational companies pay taxes fairly in the countries in which they operate" and noted that "developed countries could be more actively seizing and returning assets that may have been stolen, acquired corruptly, or transferred abroad illegally from developing countries".[49]

63. Civil society organizations have also advocated for addressing the issue of illicit financial flows as part of the post-2015 development agenda. For example, the Center for Economic and Social Rights and Christian Aid proposed an explicit target for reducing illicit financial flows as part of the new sustainable development goals , to address cross-border tax evasion, return of stolen assets, odious debt and tax abuses.[50] They further noted that "People's right to access detailed, reliable, periodic and disaggregated fiscal and financial information is strongly curtailed in many countries, especially the financial information necessary to root out illicit financial flows, curb corporate capture of development processes, and detect other tax abuses such as socially-useless tax expenditures. This fundamental vacuum in fiscal information compounds and reinforces the lack of effective, meaningful and institutionalized participation of the most disadvantaged social groups and countries in the design, implementation and monitoring of fiscal policy."

64. The Independent Expert welcomes those and other initiatives that eventually ensured that the report of the Open Working Group of the General Assembly on Sustainable Development Goals, adopted on 19 July 2014, incorporated the issue of illicit financial flows under a proposed goal 16 to "promote peaceful and inclusive societies for sustainable development". It proposed a specific goal (16.4) "to reduce significantly illicit financial and arms flows, strengthen recovery and return of stolen assets, and combat all forms of organized crime" by 2030.

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[48] Report of the High-Level Panel of Eminent Persons on the post-2015 development agenda, "A new global partnership: eradicate poverty and transform economies through sustainable development" (May 2013).

[49] Ibid., Executive summary, and pp. 10 and 55.

[50] Center for Economic and Social Rights and Christian Aid, "A post-2015 fiscal revolution: human rights policy brief" (May 2014).

65. The synthesis report of the Secretary-General on the post-2015 agenda, issued in December 2014, stressed that "access to fair justice systems, accountable institutions of democratic governance, measures to combat corruption and curb illicit financial flows and safeguards to protect personal security are integral to sustainable development", thus embedding the fight against illicit financial flows and corruption in the core of human rights protection and good governance. He noted in the same paragraph that "an enabling environment under the rule of law must be secured for the free, active and meaningful engagement of civil society" and referred to "press freedom and access to information, freedom of expression, assembly and association" as "enablers of sustainable development" (A/69/700, para. 78).

66. The report of the Secretary-General confirms the view of the Independent Expert that curbing illicit financial flows is a human rights issue and closely interlinked with the protection and enjoyment of human rights and fundamental freedoms, transparency, the right to participation and access to information. The Independent Expert fully endorses the view of the Secretary-General that the implementation of the post-2015 development agenda, including efforts to curb illicit financial flows, "must ensure that all actions respect and advance human rights, in full coherence with international standards" (ibid., para 65), and recommends that such language should be explicitly included in the final set of sustainable development goals agreed upon by Member States.

67. In his report, the Secretary-General underlines that effectively addressing illicit flows is urgent and that more vigorous implementation of the Convention against Corruption is needed, as well as measures to overcome impediments to the return of stolen assets. He further suggests that Member States should consider measures to ensure information exchange, judicial cooperation and the establishment of an intergovernmental committee on tax cooperation, under the auspices of the United Nations (ibid., para. 115).

68. The Independent Expert welcomes those recommendations, which would contribute to more inclusive participation by all Members States, including least developed countries, in current efforts by the G8/G20 and OECD to reform international tax rules and shrink tax evasion globally.

69. The Independent Expert also notes some concerns. One of the main issues is to specify how progress to achieve the proposed target on curbing illicit financial flows can be measured and how accountability for their implementation can be ensured, in particular on a matter that requires concerted effort, both by countries of origin and destination and public and private stakeholders, including governments, business enterprises and the financial sector. He shares the view of the Secretary-General that the post-2015 development agenda should include strong inclusive public mechanisms at all levels for reporting, monitoring progress, learning lessons and ensuring mutual accountability (A/69/700, para. 60).

70. He is disappointed, however, at the lack of references by the Open Working Group to addressing tax evasion and tax havens, in particular, in the proposed goal 17 on strengthening the means of implementation and revitalizing the global partnership for sustainable development. For example, finance target 17.1 only addresses the issue of taxation in the context of improving developing countries' capacity for tax and other revenue collection, but does not mention combating tax evasion. An earlier proposal on international tax evasion and avoidance by the High-Level Panel was not included in its outcome document, possibly representing a missed opportunity for developed and developing countries to address one of the most needed structural reforms.

71. To ensure that the sustainable development goal on curbing illicit financial flows will lead to policy action by countries of origin and destination and the private sector, progress needs to be tracked with suitable indicators, baselines and targets. GFI has

proposed that the sustainable development goal on illicit financial flows should incorporate the target to "reduce illicit financial flows from trade misinvoicing by 50 per cent", noting that the current proposal by the Open Working Group to "reduce significantly illicit financial flows" or to "strengthen recovery of stolen assets" leaves it very vague as to what each State or actor would have to achieve by 2030. GFI argued that selecting tax and trade-related illicit flows as a target would focus on the majority of illicit financial flows, could be measured using official government statistics, would complement transparency initiatives already under way, enhance domestic resource mobilization and tax revenue and ensure that a far larger amount of capital would remain in developing countries.[51]

72. Alex Cobham has suggested specifying three targets aimed at curbing illicit financial flows through enhanced transparency and exchange of tax information. His proposal is to:

(a) Reduce to zero the legal persons and arrangements for which beneficial ownership information is not publicly available, in order to eliminate the potential for anonymous ownership of companies, trusts and foundations;

(b) Reduce to zero the cross-border trade and investment relationships between jurisdictions where there is no bilateral automatic exchange of tax information, in order to prevent hiding of offshore assets and income streams;

(c) Reduce to zero the number of multinational businesses that do not report publicly on a country-by-country basis, in order to expose major misalignments between the distribution of profit and the location of real economic activity.

73. Cobham argued that the strength of such targets would be that data could be collected to highlight to what extent each jurisdiction had met its responsibilities, so that accountability for financial secrecy affecting others could be properly monitored and tracked over time against objective criteria rather than vague political promises.[52]

74. The Independent Expert is of the view that the targets and indicators suggested by GFI and Cobham would be essential to operationalize and track progress in implementing a rather unspecified inspirational goal of "reducing significantly illicit financial flows", that may easily fall victim to a lack of specification as to who should be responsible and held accountable for its implementation. However, such targets may need to be complemented by other indicators that would allow the tracking of progress in asset recovery efforts and the curbing of corruption and crime-related illicit financial flows.[53] Consideration should also be given to indicators that would ensure that human rights are fully integrated into national and international efforts to curb illicit financial flows. Therefore, additional targets relating to the protection of witnesses and whistleblowers, the implementation of due diligence procedures by financial business and service providers, and investigative and prosecutorial efforts in relation to tax evasion and corruption should be considered.

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[51] Tom Cardamone and Dev Kar, "Benefits and costs of the IFF targets for the post-2015 Development Agenda", working paper (4 August 2014), available from www.copenhagenconsensus.com/sites/default/files/iff_perspective_-_cardamone_kar.pdf.

[52] Alex Cobham, "Benefits and costs of the IFF targets for the post-2015 development agenda" working paper (4 August 2014), available from www.copenhagenconsensus.com/sites/default/files/iff_assessment_-_cobham_0.pdf.

[53] Angela Me, "Benefits and costs of the IFF targets for the post-2015 development agenda", working paper (30 July 2014), available from www.copenhagenconsensus.com/sites/default/files/iff_viewpoint_-_me_0.pdf.

VI. Conclusion

75. **While crime, corruption, and tax evasion and abuse can contribute to illicit financial flows, all negatively affecting human rights in a number of ways, it has been estimated that the majority of all illicit financial flows are related to cross-border tax-related transactions. In developing countries, trade and transfer mispricing is the main vehicle for tax evasion or abuse and the financial crisis has focused attention in high-income countries on tax evasion and avoidance schemes of transnational corporations. Tax havens, secrecy jurisdictions and offshore financial centres greatly facilitate illicit flows. While more empirical research is needed, such quantitative aspects will be kept in mind when the final study, with a more holistic set of recommendations, is prepared and submitted to the Human Rights Council in March 2016.**

76. **Reiterating recommendations made by the former Independent Expert and by the Special Rapporteur on extreme poverty and human rights (A/HRC/25/52, para. 50; A/HRC/26/28, paras. 79–82) the Independent Expert would like to make the following recommendations as a timely contribution to current discussions on the post-2015 development goals of the United Nations. He would also like to draw his recommendations to the attention of the third International Conference on Financing for Development, to be held in Addis Ababa from 13 to 16 July 2015.**

77. **The Independent Expert recommends that States:**

(a) Include a goal to reduce illicit financial flows in the final set of sustainable development goals, anchoring that goal in the context of good governance, the rule of law, justice and the duty of States to respect, protect and fulfil human rights;

(b) Include in the final post-2015 development agenda explicit language specifying that States and other actors, when implementing the sustainable development goals, must ensure that human rights are respected and advanced in all measures and activities undertaken, in full compliance with international standards;

(c) Complement an overarching goal of reducing illicit financial flows with measurable targets and indicators to ensure accountability for implementation;

(d) Support empirical research on illicit financial flows, improve existing data and estimations, and agree on common methodology for the purpose of tracking progress in curbing illicit financial flows by 2030;

(e) Ensure that such indicators will include specified percentage targets to reduce trade- and tax-based illicit financial flows by 2030;

(f) Include in the measurement of progress three transparency targets aimed at reducing to zero:

(i) The number of legal persons and arrangements for which beneficial ownership information is not publicly available;

(ii) The number of cross-border trade and investment relationships between jurisdictions where there is no automatic exchange of tax information;

(iii) The number of transnational business corporations that do not report publicly on a country-by-country basis.

Those zero targets should be complemented by additional indicators tracking asset recovery efforts, curbing corruption and crime-based illicit financial flows; ensuring implementation of due diligence procedures by financial businesses and

service providers; strengthening the legal frameworks and practical arrangements for the protection of witnesses and whistleblowers; and enhancing investigative and prosecutorial efforts in relation to tax evasion and corruption in consonance with international human rights standards;

(g) Consider the establishment of an intergovernmental committee on tax cooperation, under the auspices of the United Nations, to ensure that all countries, including the least developed countries, will benefit from the emerging new system of automatic exchange of tax information and can fully participate in its further design and implementation.

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Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Illicit financial flows, human rights and the post-2015 development agenda

Interim study by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky

Corrigendum

Paragraph 36

For resolution 23/9 *read* resolution 25/9

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Human Rights Council
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Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox

Compilation of good practices

Summary

This report of the Independent Expert is submitted to the Human Rights Council in accordance with Council resolution 19/10.

The report describes good practices of Governments, international organizations, civil society organizations, corporations and others in the use of human rights obligations relating to the environment, including (a) procedural obligations to make environmental information public, to facilitate public participation in environmental decision-making, to protect rights of expression and association, and to provide access to legal remedies; (b) substantive obligations, including obligations relating to non-State actors; (c) obligations relating to transboundary harm; and (d) obligations relating to those in vulnerable situations.

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I. Introduction

1. In its resolution 19/10, the Human Rights Council decided to appoint an Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. The present report is his third annual report to the Council, and the final report of the three-year mandate established by resolution 19/10.

2. One aspect of the mandate has been to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. In March 2014, the Independent Expert presented to the Council the results of his study of human rights obligations relating to the environment (A/HRC/25/53). On the basis of an extensive review of sources in human rights and environmental law, he described procedural obligations (including duties of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to effective remedies), substantive obligations (including duties of States to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors), and obligations concerning those who may be particularly vulnerable to environmental harm (including women, children and indigenous peoples).

3. In the past year, the principal focus of the Independent Expert has been on a second aspect of the mandate: to identify, promote and exchange views on best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking, especially in the area of environmental protection, and, in that regard, to prepare a compendium of best practices. The previous annual report describes the minimum obligations relating to the environment that human rights law places on all States; this report examines practices of national Governments, subnational Governments, international organizations, civil society organizations, corporations and others that employ human rights obligations relating to the environment in ways that go beyond the minimum standards.

4. At the outset, the Independent Expert reiterates his preference for the term "good practices" rather than "best practices" because, in many situations, it is not possible to identify a single "best" practice. In this regard, he agrees with other mandate holders, including the Special Rapporteur on the human right to safe drinking water and sanitation (A/HRC/10/6, para. 34).

5. On the basis of nine regional consultations and expert meetings, two country visits and dozens of responses to questionnaires sent to States, civil society organizations and others, and with the vital assistance of the United Nations Environment Programme (UNEP) and other partners, the Independent Expert has compiled more than 100 good practices in the use of human rights obligations relating to the environment. Section II of this report describes the process by which the practices were identified. Section III describes the practices themselves, organizing them into nine categories corresponding to the obligations identified in last year's mapping report (A/HRC/25/53). Section IV provides conclusions and recommendations for further work.

6. The Independent Expert also carried out other activities related to the mandate in 2014. In his March 2014 presentation to the Council, he stated that he would look at two thematic issues in particular: the problems facing environmental human rights defenders, and the relationship between climate change and human rights.

7. In 2014, he participated in three meetings on environmental human rights defenders. In March, he took part in a meeting hosted by the Universal Rights Group in Geneva, which

brought together environmental defenders from Africa and Europe. The following month, he spoke at a three-day conference in Washington, D.C., which honoured the memory of the Brazilian activist Chico Mendes 25 years after his death, and which addressed current issues facing environmental defenders, particularly in Latin America. In May, he participated in a three-day meeting in Bangkok organized by the Swedish International Development Agency, which focused on issues facing defenders in South-East Asia. He then hosted a meeting in Bangkok that brought together experts from throughout Asia to identify challenges and good practices in the protection of environmental defenders.[1]

8. With respect to climate change, the Independent Expert co-hosted with the Friedrich-Ebert-Stiftung Foundation an expert meeting in Chamonix on 15 and 16 July 2014, followed by a consultation with Governments and other stakeholders in Geneva on 17 July. He published a special report on climate change and human rights, which compiled all of the statements on human rights obligations relating to climate change made in the reports that are part of his mapping project.[2] On 17 October 2014, he and 26 other special rapporteurs and independent experts issued a joint statement calling on the State parties to the United Nations Framework Convention on Climate Change to ensure full coherence between their human rights obligations and their efforts to address climate change. In December, he attended the twentieth Conference of the Parties to the Framework Convention in Lima and spoke at two side events there.

9. From 20 to 24 October 2014, the Independent Expert carried out a mission to France to examine its experience with the use of human rights obligations in the context of environmental policy (A/HRC/28/61/Add.1).

10. In 2014, the Independent Expert also supported the efforts of others working to integrate human rights and environmental protection. For example, he gave long-distance presentations to a workshop on human rights, environment and climate change organized by the Intergovernmental Commission on Human Rights of the Association of Southeast Asian Nations (ASEAN) in Yangon, Myanmar, from 13 to 15 September, and on 6 November to a meeting of countries in Latin America and the Caribbean negotiating a regional agreement on implementation of Principle 10 of the Rio Declaration on Environment and Development. Other presentations included statements to conferences hosted by the University of the Andes in Colombia, on 17 March, and by the University of Oslo, on 9 September.

II. The process of compiling good practices

11. The process of identifying, promoting and exchanging views on good practices in the use of human rights obligations in environmental policymaking began early in the mandate. The Independent Expert and the Office of the United Nations High Commissioner for Human Rights (OHCHR) worked closely with UNEP to develop an interagency programme to identify and disseminate information about good practices. The assistance of UNEP throughout the mandate has been crucial to its success.

12. Together, the Independent Expert and UNEP identified criteria to guide the identification of good practices. They defined the term "practice" broadly to include legislation, policies, case law, administrative practices, and projects, as well as practices that go beyond established legal obligations relating to the environment. Practices can be

[1] The report of the meeting is available at http://ieenvironment.org/consultations/.

[2] The report is at http://ieenvironment.org/2014/08/08/report-on-climate-change-and-human-rights/.

implemented by a wide range of actors, including all levels of government, civil society, the private sector, communities and individuals.

13. To be a "good" practice, the practice should integrate human rights and environmental standards, including through the application of human rights norms to environmental decision-making and implementation or the use of environmental measures to define, implement and (preferably) exceed minimum standards set by human rights norms. The practice should be exemplary from the perspectives of human rights and of environmental protection, and there should be evidence that the practice is achieving or working towards achieving its desired objectives and outcomes.

14. The two principal sources for identifying good practices were consultations hosted by the Independent Expert and UNEP, as well as other partners, and a questionnaire seeking good practices that was sent to Governments, international organizations, civil society organizations, and other interested stakeholders. In addition, the Independent Expert identified good practices in his visits to Costa Rica and France. Finally, he sought good practices through additional contacts and research.

15. The consultations took place in every region. Each consultation focused on identifying good practices, as well as clarifying legal obligations and challenges, in one thematic area. Consultations took place in Nairobi in February 2013 on procedural obligations, in Geneva in June 2013 on substantive obligations, in Panama City in July 2013 on obligations relating to vulnerable groups, in Copenhagen in October 2013 on international institutions, in Johannesburg in January 2014 on constitutional environmental rights, in Bangkok in May 2014 on environmental human rights defenders, and in Chamonix/Geneva in July 2014 on climate change.

16. The largest conference, which represented the culmination of the process, was at Yale University from 5 to 7 September 2014. It was hosted by Yale and the United Nations Institute for Training and Research, with assistance from a number of other partners, including UNEP and the United Nations Development Programme (UNDP). It brought together more than 150 scholars and policy experts, and more than 100 papers were presented on issues concerning the relationship between human rights and environmental protection.[3]

17. The Independent Expert sent out the questionnaire in the spring and summer of 2014. It was also made available publicly, and it was sent throughout 2014 to anyone who requested a copy. More than 70 responses were received.

18. As a result of the consultations, country visits, responses to the questionnaire, and other contacts, the Independent Expert heard the views of a very wide spectrum of stakeholders, including Governments, international bodies, national human rights institutions, civil society organizations, corporations and academic scholars, on the use of good practices in the use of human rights obligations relating to the environment.

19. In the second half of 2014, these practices were reviewed, summarized and compiled. For each practice, a one-page summary was prepared that includes the name of the practice, its implementing actors and location, a brief description of the practice, and links to websites where further information about the practice may be found. In some cases, it was possible to supplement the material provided by the submitters, but because the Independent Expert had only limited capacity to verify the information provided in the submissions, many of the summaries primarily depend on the descriptions of the practices provided by the submitters.

[3] The papers and other information about the conference are at http://conference.unitar.org/yale2014/.

20. The compilation of good practices will be available at the official website of the mandate holder (available through www.ohchr.org) and on the personal website of the Independent Expert (http://ieenvironment.org). Although the compilation is only in English at the moment, the Independent Expert hopes to find resources to have the practices translated into the other official languages of the United Nations.

21. The compilation will also be available on a website created for it (environmentalrightsdatabase.org). The website will facilitate searching for good practices with key words and will allow the addition of more good practices in the future.

III. Good practices in the use of human rights obligations relating to the environment

22. The following description of good practices in the use of human rights obligations in relation to environmental protection is organized into nine categories: (a) procedural obligations generally; (b) the obligation to make environmental information public; (c) the obligation to facilitate public participation in environmental decision-making; (d) the obligation to protect the rights of expression and association; (e) the obligation to provide access to legal remedies; (f) substantive obligations; (g) obligations relating to non-State actors; (h) obligations relating to transboundary harm; and (i) obligations relating to those in vulnerable situations. Practices that fall into more than one category were placed in the category that seemed most relevant.

23. Because of space limitations, this report describes the practices only briefly. A fuller description of each practice is available at the websites noted above.

24. The Independent Expert is well aware that there are many more good practices in this field than those that this project has identified. The practices included here should be taken as illustrative, rather than exhaustive, of the many innovative and exemplary efforts being made to bring a human rights perspective to environmental protection.

A. Procedural obligations

25. Human rights law imposes procedural obligations on States in relation to environmental protection, including duties: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm (A/HRC/25/53, para. 29). These obligations also have support in international environmental instruments, particularly Principle 10 of the Rio Declaration, which provides that "each individual shall have appropriate access to information concerning the environment that is held by public authorities" and "the opportunity to participate in decision-making processes", and that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

26. The following sections of this report describe good practices in the use of each of these procedural obligations. This section describes several practices that are relevant to the full range of procedural obligations.

27. One such practice was the adoption in 2010 by the UNEP Governing Council of the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, 26 voluntary

guidelines that assist States to implement their commitments to Principle 10.[4] UNEP is preparing a comprehensive guide for the implementation of the Bali Guidelines, which will be published in 2015.

28. Another good practice is the implementation of these procedural obligations through regional agreements. In 1998, the States members of the United Nations Economic Commission for Europe adopted the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which states that:

> to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with provisions of this Convention (art. 1).

The Convention sets out detailed requirements for the implementation of each of these access rights. As of January 2015, the Convention has 47 Parties, which include virtually all of the States in Europe as well as a number of States in Central Asia.

29. To facilitate the implementation of the Convention, the Organization for Security and Co-operation in Europe maintains a network of Aarhus Centres, including in Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Montenegro, Serbia and Tajikistan. The Centres disseminate environmental information, carry out educational and training projects, and provide venues where the public can discuss environmental concerns. For example, the Khujand Aarhus Centre in northern Tajikistan conducted a campaign in the town of Taboshar to raise its residents' awareness of the health risks associated with a nearby abandoned uranium mine.

30. Nineteen States in Latin America and the Caribbean, with the assistance of the Economic Commission for Latin America and the Caribbean, decided in November 2014 to begin negotiation of a new regional agreement that would implement the access rights set out in Principle 10, with a view to completing the negotiation by December 2016. Together with the Aarhus Convention, this initiative will provide invaluable models to other regions considering similar agreements.

31. Civil society organizations have also engaged in exemplary practices designed to facilitate the exercise of procedural rights to information, participation and remedy. One of the most notable is The Access Initiative (TAI), a global network of more than 150 civil society organizations that work together to promote procedural rights. TAI has developed a toolkit that helps civil society to assess environmental governance in their countries and to identify opportunities to make positive changes. Together with the World Resources Institute, TAI is also developing an Environmental Democracy Index, which will measure country-specific realization of the three procedural rights according to indicators based on the Bali Guidelines. The Index should be available in 2015.

B. Obligation to make environmental information public

32. Human rights bodies have made clear that to protect human rights from environmental harm, States should provide access to environmental information (A/HRC/25/53, para. 31). Many States have adopted laws providing for such access. For example, Chile has enacted a law that includes a detailed statement of the right of everyone

[4] UNEP Governing Council Dec. SS.XI/5 (26 February 2010).

to have access to environmental information in the possession of the Government, and that provides for administrative and judicial review of alleged violations. The Czech Republic has adopted a law that allows individuals to request access to different types of information through multiple means, and that requires the Government to provide the information as quickly as possible and at the latest within 30 days of the request. Any decision to deny requested information is subject to administrative and judicial review.

33. Some States have undertaken innovative approaches to obtaining environmental information. For example, El Salvador operates an Environmental Observatory that systematically monitors potential environmental threats based on observations by a network of local observers. The Observatory provides early warning of natural disasters, including hurricanes and earthquakes, so that responses can minimize their effects on life and property.

34. Another good practice is the publication of annual reports on the state of the environment. Examples include reports by the Czech Republic that evaluate the state of the Czech environment based on 36 indicators, reports by South Africa focusing on enforcement activities, and reports by Spain that were recently redesigned to facilitate their viewing by electronic means, including on mobile devices.

35. Some of the most innovative practices in respect of environmental information concern education and awareness-raising. For example, Algeria includes environmental education as one of the key topics of its national plan of action for environment and sustainable development. It has designed and implemented educational tools for different levels of schools, as well as organizing seminars and workshops to train teachers. Ghana has instituted the AKOBEN programme to assess the performance of mining and manufacturing operations through a five-colour rating scheme that is easily understood by the public. Costa Rica's Certificate of Sustainable Tourism programme assigns companies in the tourism industry a "sustainability level" rating, which provides information to consumers about the degree to which businesses comply with or exceed environmental standards.

36. Another good practice in this area is to raise awareness at the international level of the relationship between human rights and environmental protection. UNEP has taken several important initiatives in this respect. In addition to organizing the consultations with the Independent Expert described above, it has published reports on human rights and the environment, including a joint report with OHCHR to the Rio+20 UN Conference on Sustainable Development in 2012 and a compendium of resources on human rights and the environment in 2014.

37. At the regional level, in October 2013, the Asia-Europe Meeting convened more than 130 government officials, academics, and civil society representatives from 48 Asian and European countries to discuss the challenges presented by environmental harm to the protection of human rights. In September 2014, the ASEAN Intergovernmental Commission on Human Rights organized a workshop on human rights, environment and climate change in Yangon, Myanmar, to discuss the linkages between environmental sustainability and human rights in light of the inclusion of the right to a safe, clean and sustainable environment in the ASEAN Human Rights Declaration adopted in 2012.

38. Civil society organizations have also engaged in good practices in education. For example, in Uganda, the National Association of Professional Environmentalists conducts a Sustainability School Programme that builds the capacity of local communities to seek transparency and accountability of oil companies and Governments on environmental matters.

39. States have adopted a wide variety of online tools that provide good practices in facilitating access to environmental information. The Czech Republic has created the

Integrated Pollution Register (www.irz.cz), a publicly accessible electronic database that documents environmental releases of 93 substances from domestic facilities. Serbia's Ecoregister (www.ekoregistar.sepa.gov.rs/en) is a public online database that includes more than 5,000 documents, including educational materials, statistical data on environmental information, environmental impact assessments, and monitoring plans for private companies. Search options allow users to find relevant information by geography, institution or document type, among other criteria. Users can also suggest new institutions and documents for consideration. Other tools are more focused. The South African Department of Environmental Affairs has created the South African Waste Information Centre (http://sawic.environment.gov.za), a website that provides information about waste management. A particularly creative approach to web-based information is Finland's Tarkkailija, or "Observer" (www.etarkkailija.fi), which allows users to identify themes and locations that they would like to monitor. Tarkkailija then collects information from more than 400 websites and informs the users whenever new information relevant to their criteria becomes available.

40. Examples of good practices can also be found at the subnational level. Ontario, Canada, has a web-based Environmental Registry (www.ebr.gov.on.ca) that allows the public to access a wide spectrum of environmental information, including public notices of environmental matters proposed by the Government and guidelines for commenting on the proposals.

41. There are also good practices in the use of online tools at the regional level. The Aarhus Clearinghouse (http://aarhusclearinghouse.unece.org) is an easy-to-use website that disseminates information on good practices in the implementation of the Aarhus Convention. The Commission for Environmental Cooperation, a regional organization created by Canada, Mexico and the United States of America, compiles and disseminates information on pollutant releases and transfers throughout North America through its Taking Stock report and website (www.cec.org/takingstock). The website allows users to obtain and analyse information based on location, type of pollutant and other criteria.

C. Obligation to facilitate public participation in environmental decision-making

42. Human rights bodies have made clear that States have a duty to facilitate public participation in environmental decision-making. This obligation flows from the rights of individuals to participate in the government of their country and in the conduct of public affairs, and is also necessary to safeguard a broad range of rights from environmental harm(A/HRC/23/55, para. 36).

43. A large number of States have adopted exemplary statutes providing for public participation in the development of environmental laws. For example, Chile's Environmental Framework Law provides that the Ministry of Environment should encourage and facilitate public participation in the formulation of policies, plans and environmental standards. To give effect to this provision, the Ministry created a website called e-PAC (http://epac.mma.gob.cl/Pages/Home/index.aspx), which allows citizens to provide comments on every proposed rule or regulation. Greece launched the Open Governance Project in 2009, which requires that draft regulations be made available online for public consultation. Similarly, national agencies in the United States of America must publish notices of proposed rulemaking, and the public has an opportunity to submit written comments that the agencies must take into account.

44. In addition, many States have adopted statutes requiring public participation in environmental impact assessment (EIA) procedures. For example, India amended its EIA

law in 2006 to require a public consultation period once a draft EIA is prepared. The law in Trinidad and Tobago provides the public with the opportunity to submit comments on an EIA for at least 30 days after notice for comment is advertised. In the United States, agencies must provide public notice of hearings related to EIAs, and the public may provide comments and seek judicial review of EIA decisions.

45. Some States have taken additional steps to promote informed participation by those most affected by environmental harms. Antigua and Barbuda based its Sustainable Island Resource Management Zoning Plan on extensive stakeholder consultation. In 2009, the Government of Finland implemented the Action Programme on eServices and eDemocracy, which was designed to develop new tools for citizen participation in land-use planning. One aspect of the programme is Harava, an interactive map-based application used by local governments to collect feedback from citizens, including by marking on an online map where they believe a new protected area should be located. Another programme, called Alvari, has been adopted at the subnational level in Finland by the city of Tampere. It created public advisory groups that have participated in more than 350 planning-related decisions since 2007.

46. Mexico has established consultative councils for sustainable development, which can provide forums for designing and evaluating public policies on environmental issues, as well as helping to reach consensus among interested parties in environmental decision-making. Currently, Mexico has a national council and six regional councils, each of which is composed of representatives of civil society organizations, academia, the corporate sector and government agencies. In the United States of America, the Environmental Protection Agency has established "community advisory groups" to provide a public forum for local community members to express their concerns relating to the clean-up of hazardous waste sites, and to provide the Agency with community preferences for site remediation.

47. Civil society organizations can also play an important role in facilitating public participation. In Mongolia, the Asia Foundation has worked with government agencies, citizens and corporations to create Local Multi-Stakeholder Councils (LMSCs) composed of representatives of mining companies, local governments and communities. The objective of the LMSCs is to ensure a balanced ecosystem and responsible resource use through active participation of many stakeholders. As of 2013, the project had facilitated the establishment of 31 LMSCs. In a number of African countries, Namati, a non-profit organization, has trained "community paralegals" to empower individuals and communities to protect their lands and national resources. For example, in Myanmar, Namati and a local partner organization have trained more than 30 paralegals to help families to register and protect their land rights.

48. At the regional level, a good example of facilitating public participation is the Joint Public Advisory Committee (JPAC) to the North American Commission for Environmental Cooperation. The JPAC is composed of 15 citizens, five from each country in North America, who come together to advise the Commission. The JPAC holds meetings and workshops throughout the year in different locations within the three countries. Decisions of the JPAC and records from its meetings are available on the Commission's website (www.cec.org).

49. An often overlooked aspect of the obligation to facilitate public participation is the value of assessing the effectiveness of different approaches to such participation. In Mexico, the environmental agency has created an index (the Indice de Participacion Ciudadan del Sector Ambiental, or IPC) that evaluates citizen participation in various institutions relating to environmental decision-making, on the basis of indicators in four main categories: public participation; transparency; inclusion and equality; and citizen complaints. The agency published the first IPC in 2010, and subsequent IPCs have used the 2010 report as a baseline in order to assess whether public participation is improving.

D. Obligation to protect the rights of expression and association

50. The rights of freedom of expression and association are of special importance for public participation in environmental decision-making. States have obligations not only to refrain from violating the rights of free expression and association directly, but also to protect the life, liberty and security of individuals exercising those rights, including when they are exercising their rights in connection with environmental concerns (A/HRC/25/53, para. 40).

51. States need to do more to protect environmental human rights defenders from harassment, interference and even death. In 2014, Global Witness reported that between the beginning of 2002 and the end of 2013, 908 people in 35 countries were killed because of their work defending environmental and land rights.[5] Even worse, the threats appear to be increasing: Global Witness reported that three times as many defenders were killed in 2012 as in 2002.

52. There is an urgent need for good practices in the protection of environmental human rights defenders. A number of international institutions and civil society organizations (but not, unfortunately, States) have provided examples of such practices.

53. At the regional level, a good practice has been the clarification of legal obligations and the issuance of precautionary measures. In its judgment of 3 April 2009 in *Kawas Fernández* v. *Honduras*, the Inter-American Court of Human Rights held, inter alia, that a State's failure to protect the life of an environmental human rights defender and to adequately investigate her death violated her rights to life and to freedom of association. The Court required that the State compensate her relatives and take other steps to publicize the work of environmental defenders. In addition, the Inter-American Commission on Human Rights often issues precautionary measures to protect environmental defenders.

54. Notable good practices adopted by civil society organizations include the following:

- The Fédération Internationale des Droits de l'Homme (FIDH) and L'Organisation Mondiale Contre la Torture (OMCT) have created an Observatory for the Protection of Human Rights Defenders, which provides emergency protection to human rights defenders in the field (including urgent interventions, international missions and material assistance), cooperates with national and international protection mechanisms, and mobilizes the international community and the media to protect defenders.
- FORUM-ASIA provides urgent assistance and protection to human rights defenders at risk, including by providing relocation support, medical assistance and legal aid.
- Protection International has developed training manuals for human rights defenders and disseminated the information to hundreds of defenders through training sessions.
- The Environmental Law Alliance Worldwide (ELAW), a network of 300 public interest advocates from 70 countries, provides legal and scientific support to grass-roots environmental lawyers working in their home countries.
- Front Line Defenders issues identification cards to human rights defenders so that they have an easy-to-use tool to show that they are internationally recognized.

[5] Global Witness, *Deadly Environment: The Dramatic Rise in Killings of Environmental and Land Defenders*, April 2014, available at http://www.globalwitness.org/deadlyenvironment/.

- The Women's Human Rights Defenders International Coalition, a network of 28 organizations, provides many support services, including maintaining an online directory of organizations that can assist defenders.
- The Goldman Environmental Prize amplifies the voices of selected grassroots environmentalists by providing them international recognition and financial support.

E. Obligation to provide access to legal remedies

55. Human rights agreements have established that States have an obligation to provide for an effective remedy for violations of protected rights, and human rights bodies have applied that principle to human rights whose enjoyment is infringed by environmental harm (A/HRC/25/53, para. 41).

56. States have adopted a wide range of good practices in the provision of access to effective remedies for environmental harm, from dedicated environmental tribunals, to procedural rules that facilitate access to courts by environmental plaintiffs, to the increasingly important roles of national human rights institutions, ombudspersons and regional tribunals.

57. A number of States have found that one way to ensure that environmental claims are heard by courts with relevant expertise is to establish dedicated environmental courts. The Land and Environment Court of New South Wales, Australia, which was created in 1980, can claim to be the first specialist environmental superior court in the world. The court has jurisdiction over a wide variety of issues, including appeals from environmental permits, Aboriginal land claim cases, criminal proceedings for offences against planning or environmental laws, and mining issues. Other examples of dedicated tribunals with jurisdiction to hear a broad spectrum of environmental claims include Costa Rica's Environmental Administrative Tribunal, established in 1995, and India's National Green Tribunals, established in 2011.

58. In most States, environmental cases continue to be heard by courts with general jurisdiction. There are too many instances of such courts deciding environmental disputes through the application of human rights norms to cite them all, but some examples are provided in the next section, on good practices in the use of substantive obligations.

59. However, it is important to note here some good practices taken by States to facilitate access to courts by environmental plaintiffs. The Land and Environment Court of New South Wales, for instance, which is located in Sydney, has assisted individuals who live in rural areas within its jurisdiction by allowing cases to be filed in more than 150 local courthouses or through the Internet, and by conducting preliminary hearings by telephone and final hearings at the site of the dispute. It also has a comprehensive website that provides information on how individuals can represent themselves before the court. In the Philippines, the Supreme Court has adopted rules of procedure for environmental cases that allow plaintiffs to bring cases on behalf of others, including minors and future generations. Similarly, the Constitutional Chamber of the Supreme Court of Costa Rica has broadened standing by allowing individuals to bring actions on behalf of the public interest, including in the interest of environmental protection. Moreover, any person may file a case regarding a constitutional right in Costa Rica without an attorney, with no filing fees, in any language, at any time, and in any form, including handwritten filings.

60. The Philippine rules of procedure also address "strategic lawsuits against public participation" (SLAPP) suits – that is, countersuits by defendants against environmental plaintiffs, which are designed to discourage them from seeking legal remedies. The Philippine rules allow affected plaintiffs to call possible SLAPP suits to the attention of the

court, which may then shift the burden to the defendant to demonstrate that the suit is not a SLAPP suit. If the court dismisses the SLAPP suit, it may award damages and attorneys' fees to the environmental plaintiff.

61. Ireland has facilitated access to environmental remedies by departing from its normal rule, according to which the winning party is entitled to recover its legal costs from the losing party. This rule can have a chilling effect on environmental plaintiffs that have few resources. Under an act adopted in 2011, plaintiffs bear only their own costs in actions to ensure compliance with environmental requirements, but they may be entitled to recover their costs from defendants if they win.

62. In the United States of America, many national environmental statutes allow members of the public to initiate lawsuits against alleged violators. Although the cases are often called "citizen suits", the plaintiffs need not be citizens. The statutes authorize courts to order compliance with the law on the basis of citizen suits, and although the plaintiffs are not authorized to recover damages, they may receive attorneys' fees.

63. Another good practice in connection with the obligation to provide effective remedies for environmental harm is building the relevant expertise of the judiciary. An example in this respect is the series of judicial symposiums on environmental decision-making, the rule of law and environmental justice that have been hosted by the Asian Development Bank since 2010. A key outcome of these meetings has been the creation of the Asian Judges Network on Environment, which facilitates the sharing of information and experience among senior judges in countries belonging to ASEAN and the South Asian Association for Regional Cooperation. The Network has its own website (www.asianjudges.org), which provides a database of national environmental laws as well as information on upcoming events.

64. The Organization of American States programme on judicial facilitators, which it has developed in cooperation with various States (including Argentina, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Paraguay), is another good practice in the provision of effective remedies. Judicial facilitators are nominated by local communities and appointed by judges under whose supervision they work. After they have received training, they can undertake a number of functions, including providing technical assistance to individuals in the preparation of claims, providing mediation between parties, and assisting in the assessment of damages.

65. Yet another good practice in this area is the use of national human rights institutions to address environmental issues. For example, the Kenyan national commission on human rights has increasingly focused on environmental concerns, including by investigating forced evictions in a protected area, and human rights violations and environmental degradation occurring at salt manufacturing companies. In Mexico, the national human rights commission made a number of recommendations concerning environmental protection even before the Mexican Constitution was amended in 2012 to include a right to a healthy environment. In Thailand, the subcommittee on civil and political rights of the national human rights commission found in 2012 that the commission had jurisdiction to examine alleged human rights violations in a sugar cane plantation in Cambodia owned indirectly by a Thai company.

66. The Malaysian national human rights commission (SUHAKAM) has used "national inquiries" to examine systemic human rights issues. An important recent example of its use of the national inquiry process in the environmental context was the National Inquiry into the Land Rights of Indigenous Peoples, undertaken to investigate violations related to the land rights of indigenous peoples in Malaysia. Between 2002 and 2010, SUHAKAM received numerous complaints from indigenous peoples, including allegations of encroachment and/or dispossession of land, and of delays in processing requests for

indigenous titles. SUHAKAM decided to address the root causes of the issues comprehensively by taking cognizance of the experiences of indigenous peoples throughout the country. Its National Inquiry resulted in a final report published in April 2013, with detailed findings and 18 recommendations.

67. Some States have officials dedicated to protecting constitutional rights, which provide another avenue for ensuring access to remedies for environmental harm. For example, Brazil's Ministerio Publico, or public prosecutor, has broad powers to enforce constitutional rights, including the constitutional right to an ecologically balanced environment. The Ministerio Publico has been very active in promoting environmental protection, bringing more than 4,000 environmental cases in the state of Sao Paulo alone.

68. A number of States have ombudspersons who have taken an active role in environmental protection. For example, much of the work of the Costa Rican ombudsperson in recent years has concerned environmental issues. In 2011, about 10 per cent of the more than 3,000 cases received by the office of the ombudsperson concerned the right to a healthy environment. Similarly, since 2013, the Croatian ombudsperson has received 20 complaints relating to environmental protection and another 19 relating to noise pollution. In Portugal, the office of the ombudsperson has also acted on complaints relating to environmental protection, as well as acting on its own initiative, including with respect to illegal construction in a national park.

69. A pathbreaking development was the establishment in 2007 of Hungary's ombudsperson for future generations. The ombudsperson has the authority to initiate or participate in investigations upon receiving complaints, to submit petitions to the constitutional court, and to initiate intervention in public administrative court cases regarding environmental protection.

70. At the regional level, human rights commissions and courts have been in the forefront of bringing human rights norms to bear on environmental issues. The African Commission on Human and Peoples' Rights, the Court of Justice of the Economic Community of West African States, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have all considered complaints of human rights violations involving environmental harm, and together are developing a detailed jurisprudence on environmental human rights law.

71. Another good practice is the inclusion in regional environmental agreements of procedures that allow members of the public to raise claims for independent investigation and reporting. For example, the Submissions on Enforcement Matters process established by the North American Agreement on Environmental Cooperation allows a resident of any of the three North American countries to file a claim that one of the States is failing to enforce its domestic environmental law. Although the Commission cannot issue binding decisions, its secretariat can investigate the claim and issue a public report. This practice has also been adopted in some bilateral and regional trade agreements between the United States of America and other countries. Similarly, the Aarhus Convention establishes a Compliance Committee with the authority to review the compliance of parties with their obligations under the Convention, including on the basis of communications by members of the public. The Committee can issue reports and make non-binding recommendations.

F. Substantive obligations

72. In addition to the procedural obligations described above, States have substantive obligations to adopt and implement legal frameworks to protect against environmental harm that may interfere with the enjoyment of human rights (A/HRC/25/53, para. 46). In an important sense, all environmental laws that set stringent standards for air quality, water

quality, toxic releases and/or other environmental matters are good practices for the protection of the many human rights that depend on a healthy environment. However, this section focuses on practices that link strong environmental standards more explicitly to human rights.

73. Perhaps the most important example in this category is the proliferation of constitutional rights to a healthy environment. More than 90 national constitutions now recognize some form of this right. (Many other constitutions include references to the importance of environmental protection.) About two-thirds of these constitutional rights refer to health, and another one-quarter refer to an ecologically balanced environment. Alternative formulations include rights to a clean, safe, favourable or wholesome environment.

74. Experts have identified many potential benefits of adopting a constitutional environmental right, including that the recognition of such rights can lead to the enactment of stronger environmental laws, provide a safety net to protect against gaps in statutory environmental laws, raise the profile and importance of environmental protection as compared to competing interests such as economic development, and create opportunities for better access to justice and accountability.[6]

75. Both country visits undertaken by the Independent Expert were to States with strong records of enforcement of constitutional environmental rights, as the separate reports on Costa Rica and France describe in more detail. Judicial decisions in many other countries have also interpreted constitutional environmental rights to require substantive environmental protections. Notable examples include decisions by the Supreme Courts of Argentina and the Philippines.[7]

76. In some States, courts have interpreted other constitutional rights to incorporate environmental protections. A leader in this regard has been the Supreme Court of India, which has interpreted the right to life in the Indian Constitution as applying to environmental threats.[8] The Supreme Court of Pakistan has taken a similar approach.[9]

77. Constitutional environmental rights can lead to actions by actors other than courts and government agencies. In 2014, the Finnish Ministry of the Environment encouraged all interested actors, including communities, corporations and individuals, to make commitments towards greater sustainability, in accordance with the Finnish Constitution, which states that "nature and its biodiversity, the environment and the national heritage are the responsibility of everyone". The Ministry provided guidance on how commitments can be developed and registered online, as well as examples and indicators for monitoring implementation.

78. Of course, whether or not States have adopted a constitutional right to a healthy environment, they can and should adopt strong environmental laws. A good practice relating to such laws is their regular review and strengthening, including through the

[6] See the report on regional consultation on constitutional rights, Johannesburg, 23-24 January 2014, available at http://ieenvironment.org/2014/11/21/report-on-constitutional-environmental-rights. See also David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, UBC Press, 2012) and James R. May and Erin Daly, *Global Environmental Constitutionalism* (New York, Cambridge University Press, 2014).

[7] *Mendoza Beatriz Silva et al.* v. *State of Argentina et al.*, 8 July 2008 (Argentina); *Minors Oposa et al.* v. *Fulgencio Factoran*, 30 July 1993, and *Metropolitan Manila Development Authority* v. *Concerned Residents of Manila Bay*, 18 December 2008 (Philippines).

[8] *RLEK* v. *State of Uttar Pradesh and Others*, 12 March 1988; *Subhash Kumar* v. *State of Bihar and others*, 1 September 1991; *M.C. Mehta* v. *Union of India*, 18 March 2004.

[9] *Shehla Zia and others* v. *WAPDA*, 12 February 1994.

incorporation and protection of rights. A recent example was the adoption by China of a new framework Environmental Protection Law, which entered into force in January 2015. Among other things, the law sets out the right of citizens, legal persons and other organizations to obtain environmental information, and requires environmental regulators at all levels to disclose environmental information and improve public participation procedures.

G. Obligations relating to non-State actors

79. The Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in its resolution 17/4, make clear that States are required to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises", including by "taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication" (A/HRC/17/31, principle 1). The Guiding Principles also state that corporations themselves have a responsibility to respect human rights. The duty to protect and the responsibility to respect extend to human rights abuses caused by pollution or other environmental harm (A/HRC/25/53, para. 60).

80. A good practice of States is to commit to support the implementation of the Guiding Principles, including with respect to activities that may affect the environment. In response to an invitation by the European Commission, European Union member States have submitted plans for national implementation of the Principles. For example, at the request of the Government, the Danish Council on Corporate Social Responsibility produced guidelines to help companies meet international social and environmental requirements in their supply chain. The United Kingdom of Great Britain and Northern Ireland has committed to implement the Principles by, inter alia, ensuring that agreements facilitating overseas investment do not undermine the host country's ability to impose the same environmental and social regulations on foreign investors as it does on domestic firms.

81. Another good practice is the preparation of "sustainability reports", which describe the economic, environmental and social impacts caused by companies' everyday activities. The Global Reporting Initiative, an international non-profit organization that promotes the use of sustainability reporting, has developed comprehensive guidelines for preparing sustainability reports that provide a framework for measuring and reporting sustainability-related impact and performance, including through indicators relating to the protection of human rights and the environment. It also hosts a sustainability disclosure database where organizations can publish their reports.

82. Individual companies have also reported good practices. For example, Asia Pulp Paper Group (APP), one of the world's largest pulp and paper companies, adopted a Forest Conservation Policy in 2013 that provides that where "new plantations are proposed, APP will respect the rights of indigenous peoples and local communities", including recognition of customary land rights, constructive dialogue with stakeholders and responsible handling of complaints. APP has developed an online "monitoring dashboard" to allow interested parties to follow progress of the policy.

83. The Coca-Cola Company has adopted a human rights policy that commits it to identify, prevent and mitigate the human rights impacts of its business activities, and its contracts with its suppliers require, among other things, that they comply with all applicable environmental laws. It regularly undertakes independent human rights assessments of its suppliers. Similarly, Patagonia, a manufacturer of outdoor clothing and equipment, has been conducting environmental and social audits of its suppliers since 2008. The audits can result in the termination of contracts with companies that do not meet its standards. Patagonia also gives 1 per cent of its annual profits to environmental groups and activists

throughout the world, and reports that in 2014, it donated some $6.6 million to 770 environmental groups.

H. Obligations relating to transboundary environmental harm

84. Many grave threats to the enjoyment of human rights are due to transboundary environmental harm. Although the precise nature of States' human rights obligations in this respect is not always clear, there is a strong trend towards encouraging States to take actions to protect against transboundary harm to human rights caused by actions under their jurisdiction or control. Moreover, it is clear that States have an obligation of international cooperation with respect to human rights, which is of particular relevance to global environmental threats such as climate change (A/HRC/25/53, paras. 64, 67).

85. In light of the lack of complete clarity in human rights law with regard to transboundary environmental harm, a particularly important good practice is the legal recognition by a State of the rights of individuals who reside outside its territory but who may suffer environmental harm from actions arising within its territory. One example is transboundary environmental impact assessment (EIA) that allows for the participation of the affected public on both sides of the border. The chief international agreement is the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, which sets out detailed requirements for transboundary EIA. As of January 2015, it has 45 parties, including most States in Europe. The Convention provides that the party where a covered activity is located must give the public of the affected State an opportunity to participate in the EIA process that is equivalent to the opportunity provided to the public of the State of origin.

86. An innovative example of the consideration of transboundary effects beyond the requirements of the Espoo Convention is the effort by the Federated States of Micronesia to participate in the EIA of a proposed expansion of a coal-fired power plant in the Czech Republic, in order to draw attention to the effects of the plant on global climate change, which particularly threatens the inhabitants of Micronesia. In 2011, the Czech Ministry of the Environment issued an impact statement that recognized the Federated States of Micronesia as an "affected state", and that required the owner of the plant to provide a compensation plan that would offset 5 million tons of carbon dioxide and thus mitigate the environmental impact of the project.

87. States have also taken creative steps to enable victims of transboundary environmental harm to have access to courts in the jurisdiction where the harm originates. An early example is the 1976 Nordic Environmental Protection Convention, which requires each of its parties (Denmark, Finland, Norway and Sweden) to provide reciprocal access to domestic legal remedies for transboundary environmental harm, allowing foreign residents to pursue whatever remedies in the country of origin that that country would provide to its own residents. An alternative basis for such reciprocal access is exemplified by a model statute adopted by a liaison committee of the Canadian and the U.S. conferences on uniform provincial and state laws. Similarly to the Nordic Convention, the model law provides that "a person who suffers, or is threatened with, injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief with respect to the injury or threatened injury . . . as if the injury or threatened injury occurred in this jurisdiction." The model law has been enacted by seven U.S. states and four Canadian provinces.

88. Climate change may be the most challenging international environmental threat to human rights. A number of Governments provide examples of good practices in the use of human rights obligations relating to climate change. In 2012, the Scottish Parliament became the first legislative body in the world to explicitly recognize and support the

concept of climate justice, and in the same year, the Government of Scotland launched a £3 million Climate Justice Fund to support the development of water adaptation projects in Malawi, Rwanda, Tanzania and Zambia. At the end of 2013, the Government launched a second £3 million Climate Justice Fund. According to the Government, the second round of funding should "address specific climate justice principles through a human-rights based approach: approaches which empower vulnerable groups in decision-making and access to resources and realizing their rights – through inclusion, equality, transparency, participation, and information – and so delivering climate resilience, strengthening civic society, alleviating poverty, and benefiting the wider environment."

89. Also in 2013, Guatemala adopted a climate change framework law that has several important elements relating to human rights, including provisions that the Government facilitate broad public participation in designing and carrying out climate change actions. Similarly, the Jordanian Ministry of the Environment published a national climate change policy in 2013 that integrates a human rights approach to climate change mitigation and adaptation. The policy lists as a short-term objective that the "interests of vulnerable groups, with emphasis on the poor, youth and gender are adequately addressed in mitigation and adaptation policies and strategies." The policy also provides for a campaign to increase public awareness and facilitate public consultation.

90. Two other States provide good practices in ensuring that efforts to abate or adapt to climate change respect the rights of indigenous and tribal peoples. The Reducing Emissions from Deforestation and Forest Degradation (REDD+) programme, which was initiated by the sixteenth Conference of the Parties to the UN Framework Convention on Climate Change, creates incentives for developing countries to reduce emissions from deforestation and forest degradation, including through forest conservation and sustainable management. To avoid conflicts and to protect the rights of indigenous peoples in forests that might be subject to REDD+ projects, Suriname created the REDD+ Assistants Programme, in which representatives selected by their own communities are trained by the Government to understand REDD+ and to help involve indigenous and tribal peoples in the REDD+ decision-making process.

91. In Australia, the National Indigenous Climate Change project is a forum established in 2008 by indigenous leaders to facilitate dialogue between corporate representatives, indigenous peoples and other experts about climate change and participation in carbon markets. According to the project's webpage (www.indigenousclimatechange.com.au), the project, "(along with other organizations and alliances representing Indigenous perspectives) has worked to identify mutual opportunities with representatives of Corporate Australia and to have issues such as land tenure, native title and cultural and moral rights addressed by Government in the formulation of an emissions trading scheme."

92. International cooperation can be found not only at the level of national Governments, but also between local municipalities. A good practice in this respect is the partnership between the cities of Mwanza, Tanzania, and Tampere, Finland. Since 2002, the cities have partnered in various environmental activities, sharing knowledge and experiences. The results include an afforestation programme, the demarcation of village woodlands, and environmental management training seminars.

I. Obligations relating to members of groups in vulnerable situations

93. The human rights obligations relating to the environment include a general obligation of non-discrimination in the application of environmental law and policy. As described by the Independent Expert in his mapping report, States have additional obligations with respect to those who may be particularly vulnerable to environmental

harm, including women, children, minorities and those living in poverty, as well as indigenous peoples (A/HRC/25/53, paras. 69-78).

94. For example, the Committee on the Elimination of Discrimination against Women has emphasized that States should ensure that public participation in environmental decision-making, including with respect to climate policy, includes the concerns and participation of women. The Feminist Participatory Action Research programme of the Asia Pacific Forum on Women, Law and Development is a good practice in empowering women to participate in policy debates over climate change. Together with local partner organizations, the Asia Pacific Forum helps women in rural, indigenous and urban poor communities to document their own experiences by setting their own research agenda, conducting the research themselves and advocating for change as a result. For example, after conducting its own research, a community in the Philippines passed a resolution to prevent the use of destructive fishing practices and now requires individuals to adhere to strict fishing and hunting schedules.

95. The rights of children are often overlooked in setting environmental policies. The United Nations Children's Fund (UNICEF) is partnering with countries to try to reduce the effects of climate change and environmental degradation on children's rights, and to "identify and enhance opportunities to advance the rights of children which arise from global and local attention on climate change and environmental degradation." In Burundi, for example, UNICEF is implementing Project Lumière, which enables community groups to purchase bicycle pedal-powered generators and LED lights that can provide light for a household for up to 10 days. Access to energy protects child health and safety by reducing harmful emissions from the burning of kerosene and firewood in homes, and by providing light at night for children to study.

96. In the United States of America, an Executive Order issued in 1994 by the President provides a basis for continuing attention to the environmental and human health effects of actions by the national Government on members of minority and low-income groups, as well as on indigenous peoples, with the goal of achieving "environmental justice" for all communities. The Executive Order requires agencies of the Government to address any potentially adverse human health or environmental effects of their activities on members of minority or low-income populations. Each major agency has a working group on environmental justice, which provides guidance for that agency and coordination with other agencies. In addition, the Environmental Protection Agency has developed Environmental Justice Access Plans that set out measurable commitments. By engaging with environmental justice advocates and communities through community research and open dialogue, the Agency strives to ensure public participation in integrating environmental justice into day-to-day work and decision-making.

97. A number of international instruments and human rights bodies have detailed the obligations of States with respect to indigenous peoples, whose rights are particularly vulnerable to environmental harm. Among other duties, States should recognize the rights of indigenous peoples with respect to the territory that they have traditionally occupied, including the natural resources on which they rely, facilitate the participation of indigenous peoples in decisions that concern them, guarantee that the indigenous community affected receives a reasonable benefit from any such development, and provide access to remedies, including compensation, for harm caused by the activities (A/HRC/25/53, para. 78).

98. Many good practices were presented in relation to indigenous rights. At the regional level, the Inter-American Court of Human Rights has done a great deal to clarify the obligations of States relating to indigenous and tribal peoples' rights in the territory that

they have traditionally occupied.[10] At the national level, a number of courts have also issued decisions clarifying the rights of tribal peoples. For example, the Supreme Court of Mexico decided in 2013 that the Government had not adequately consulted with the Yaqui tribe with respect to construction of an aqueduct, and that the authorization of the project must wait until after consultation takes place. Also in 2013, the Supreme Court of India requested the state of Odisha to consult with tribal assemblies in accordance with the Indian Forest Rights Act, which recognizes a broad range of customary forest rights of tribal peoples and traditional forest dwellers, in connection with an application to clear a forest area to mine for bauxite. After the tribal assemblies rejected the proposal, the Minister for the Environment and Forests turned down the application.

99. Another type of good practice is legislative action that recognizes the legal rights of indigenous representatives in natural resources. After many years of legal uncertainty about the management and use of natural resources in the county of Finnmark, the ancestral land and home of the Sami people, in 2005 the Norwegian Parliament adopted the Finnmark Act through a process of consultation with the Sami Parliament. The Act transferred ownership of the land to a new entity governed by a board half of whose members are appointed by the Sami Parliament, and created a special court to decide disputes concerning land rights.

100. Indigenous organizations have engaged in good practices to protect indigenous rights and promote the sustainable use of resources, including in connection with protected areas. For example, the Commission on Environmental, Economic and Social Policy of the International Union for Conservation of Nature, the Forest Peoples Programme and other indigenous peoples' organizations help local communities to assess and redress situations where they believe that they have been negatively affected by the designation or management of a protected area.

101. An example of a good practice in the management of protected areas is provided by the Sarstoon Temash Institute for Indigenous Management (SATIIM), a community-based indigenous environmental organization that co-manages, together with the Forest Department of Belize, the Sarstoon Temash National Park on lands traditionally used by indigenous Garifuna and Maya communities. With the assistance of SATIIM, in 2008 the communities of Conejo and Santa Teresa prepared forest sustainable management plans, which identify the timber and other resources that each community can harvest based on ecological surveys, and which include mitigation measures for any possible adverse effects on the environment.

102. Another good practice is raising the awareness of indigenous communities of their rights. Natural Justice, a civil society organization based in South Africa, assists local communities and indigenous groups to prepare "community protocols" that set out their understanding of their customary, national and international rights relating to their land and natural resources. Each community develops its own protocols in a format that is most meaningful to that community. Protocols can be written documents, and can also take the form of visual art, theatre or music.

IV. Conclusions and recommendations

103. **The practices described in this report demonstrate concrete, innovative ways that the use of human rights obligations can help to make environmental policies fairer, more effective and more respectful of the concerns of those most affected by**

[10] See, for example, *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, 31 August 2001, and *Saramaka People* v. *Suriname*, 28 November 2007.

environmental harm. The Independent Expert encourages all those interested in human rights and the environment to review the compendium of practices for sources of inspiration and models for future actions.

104. The Independent Expert also urges Governments, international institutions, corporations, civil society organizations and others to continue to develop good practices, and the Human Rights Council and OHCHR to continue to cooperate with other partners, such as UNEP and UNDP, to encourage such development and to disseminate information about such practices.

105. That so many are engaged in bringing human rights perspectives to environmental protection is highly encouraging. At the same time, the emphasis on good practices should not obscure the work that remains to be done to ensure that human rights relating to the environment are fully respected, protected and fulfilled.

106. Many areas require further attention in this respect. The Independent Expert continues to emphasize the importance of two areas in particular: the importance of clarifying and implementing human rights obligations relating to transboundary environmental harm, in particular with regard to the global harm caused by climate change; and the urgent need to take more effective steps to protect the rights of environmental human rights defenders.

107. Finally, at the conclusion of the three-year mandate established by Human Rights Council resolution 19/10, the Independent Expert wishes to express his profound gratitude to all those people, far too many to name, who have helped him to carry out this work.